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THE LAW OF REVENUE SALES

PART I
THE PATNI SALE LAW

BEING

REGULATION VIII OF 1819

AS MODIFIED UP-TO-DATE

WITH NOTES

BY

J. N. ROY

OF GREY'S INN, BARRISTER-AT-LAW;
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PREFACE.

I started the compilation of this book five years ago, but was obliged, owing to various reasons, to put it aside. At the request, however, of a few friends, who have kindly taken the trouble to read over the manuscript, I have brought it up-to-date, and now publish it in the hope that it will prove useful to the Bench and the Bar, for whom it is primarily intended. For the convenience of Revenue Courts, I have incorporated the Proceedings and the Rules of the Board of Revenue under appropriate headings. This, I trust, will enhance the utility of the book.

My thanks are due to the pleaders of Patuakhali and of Comilla for the free use they have allowed me of their Bar Libraries, and to several of my friends who have helped me with their valuable suggestions

J. N. ROY,
Additional District Magistrate.

COMILLA,
15-8-12.

CONTENTS.

PAGES.

SECTION I .. .. 1—49

Preamble—Patni, derivation of—Patni Taluk, origin of—Reg. VIII of 1819, local extent of—Creation of Patni tenures, By proprietor of a temporarily settled estate—Board's proceedings—By a Hindu widow—Valid when legal necessity exists or estate benefits—Valid when reversioner consents—Grant by a widow not void but voidable—Acts which amount to an election to treat the lease as valid—By a proprietor's widowed mother—Limitation in case of an alienation by a Hindu widow—By a Mahomedan widow—By a Shebait—General principle to be followed in such cases—Limitation in such cases—By a mortgagor—By a lease including *jote-jumas* and *patni taluks*—By a lease creating patnis in more estates than one—Board's proceedings—By a patnidar taking land not covered by *kabuliyat*—By a lease violating the rules against perpetuities—By *benami* transaction—Not an agricultural lease—Not an out-and-out sale—The relation of landlord and tenant exists between zamindar and patnidar—"rent," definition of—Patni-rent must be based on *patni patta*—Rent is payable to the landlord—Abwabs are not rent—Road and Public Work Cesses—payable by talukdar and zamindar—But special contracts can be made—Question to be considered in such contracts—Cesses recoverable as rent but they are not charges on the estate—Chowkidari tax not an abwab—What is *dák* cess—Payment depends upon contract—Is *dák* cess leviable as rent—Suits for *dák* cess cognizable by Small Cause Courts—Patnidar can deposit rent—Effect of withdrawal—Remedy where excess exacted—Leases with defined boundaries—Increase by encroachment—On landlord's land—On third person's land—Increase by accretion—Reg. XI of 1825—Increased rent must be according to conditions laid down in Reg. XI—Rate of assessment—Reformed site—Back-rent—Suit for enhancement of rent—Diluvion—Land taken up by Government for public purposes—Resumption as Chakeran—Dispossession through defect of lessor's title—Abatement on the ground of misrepresentation of assets—Miscellaneous—Case in which a patnidar cannot claim abatement—Abatement how claimed—Amount to be deducted how ascertained—*Res Judicata* in cases of claims for reduction of rent—Refund—Patnidar entitled to

SECTION 1—(*contd.*) PAGES.

compensation—Apportionment of compensation—Patni land taken up by private parties and not by or through Government—What are Chakeran lands—Rights of a zamindar and of a patnidar to resume Chakeran lands—Courts must look at the contracts—Additional rent payable by patnidar—Principle—Basis of calculation—Both zamindar and patnidar entitled to participate in sale-proceeds—Rights of a raiyat settled on resumed land as against a patnidar—Form of suit to recover possession—Limitation—Can a patnidar resume *lakhiraj* land—If *lakhiraj* created before 1790—If after 1790—Burden of proof—Right to measure—Can a co-sharer measure?—*Onus* where a defendent pleads a patni tenure—On patnidar first—Parol evidence admissible—s. 195 (*c*) of Bengal Tenancy Act, effect of—Tenancy Act supplements patni Regulation—S. 15 of Bengal Tenancy Act applies to patni tenures—S. 13 of Bengal Tenancy Act does not—Principle deducible from the rulings.

SECTION 2 .. .. 49—50

Leases fixing rent in perpetuity or for a longer term than ten years declared valid, though executed while section 2, Reg. XLIV, 1793, was in force—Existing leases validated.

SECTION 3 .. .. 50—71

Patni tenures declared valid, transferable and answerable for debt—Patnidar's right of under-letting declared—Patni tenures declared not voidable for arrears—Patnidar can exercise same rights of ownership as zamindar—but he is not proprietor as defined in the Registration Act—zamindar has still an interest left—Board's proceedings—*Patni taluk* imports hereditary tenures—Patni tenures alienable—A portion cannot be sold under the Reg.—A transfer of a portion not binding on the zamindar—but it is not absolutely void—Such a transferee is liable jointly and severally for rent—but his liability ceases when whole tenure is transferred—Liability of tenants—Civil Courts can apportion rent—Partition amongst landlords binding on patnidars—Partition amongst patnidars is not binding on landlords—but a landlord may recognise partition—by accepting rent—*Dakhilas*—Partition between *patnidar* and zamindar—Principle—*Patnidar* entitled to claim partition—Rules deducible from the Authorities—*Darpatnidars* need not be made parties—The doctrine of merger did not apply before the passing of Transfer of Property Act—It applies now—Board's proceeding—Right to minerals—Temporary leases—Permanent leases—English law—Principle—General rule to be followed—Language and intent of parties must be taken into Account—Application of cl. (*o*), s. 108 of Transfer of Property Act—Patni tenures liable to sale for arrears of rent—Section 65 of the Tenancy Act applies to patni tenures—Object of the provision—S. 65 of the Tenancy Act—When tenures sold otherwise than for arrears of rent—When sold for arrears of

SECTION 3—(*contd.*) PAGES.

rent—Remedies open to the landlord for execution of rent-decrees—Rights of co-sharer landlord—A decree by co-sharer landlord is not a decree for rent—Sale of a tenure in execution of rent-decree—Only the rights, title and interest passes—But if co-sharers made defendants tenure liable to sale—Relinquishment and surrender of patni.

SECTION 4 .. .. 72—77

Inferior tenures under similar title-deeds confer similar interest to that provided for *patni talaks* in section 3—Creation of *Darpatni*—Mere possession for 12 years not sufficient—When higher tenures found *benami*, *darpatni* does not necessarily lapse—Transfer of *Darpatni tenures*—S. 12 of the Tenancy Act—Position of an unregistered *darpatnidar*—An unregistered transferee not a trespasser—Payment of rent—Registered tenant liable for rent—Real tenant may also be sued—Interest—S. 67 of the Tenancy Act does not control s. 179—Contract as to interest consequently binding—*Abwab* Stipulation to pay *abwab* binding—Abatement of rent—Refund—*Patnidar* who gives *darpatni* cannot measure raiyat's holdings—He is entitled to a general survey—Ejectment—*Darpatnidar* cannot be ousted.—Right of suit.

SECTION 5 .. .. 77—78

Zamindar not entitled to refuse to give effect to a transfer—but may demand fee fixed at two *per cent.* on the *jama*—but the maximum one hundred rupees—May also demand security as far as half the *jama*—Above rules to apply to sales in execution and all alienations—but no fee on sale for arrears.

SECTION 6 .. .. 78—84

Zamindar may refuse sanction to transfer, till fee and security tendered—Registration in case of voluntary alienations—Zamindar entitled to registration-fee and security—Position of a transferee of a fractional share—Purchaser at a patni sale or sale for arrears of rent need not pay any fee—but a purchaser at an ordinary Civil Court Sale must—S. 13 of the Tenancy Act does not apply to patni tenures—but applies to *darpatni taluks*—Registration of changes by death—Procedure in cases of succession—No registration in zamindari *Sheristá* necessary—But ss. 15 and 16 of Bengal Tenancy Act applies—Suit to compel registration of names—A *patnidar* may bring a suit to register his name—Board's proceedings—but not a *sepatnidar*—A zamindar cannot sue for security—He must proceed under s. 7 of the Regulation—Where no security is demanded and rent is tendered,—zamindar's refusal indefensible—Effect of registration—Primary object of registration—Recorded tenant liable for rent where there is no registration—Effect of sale where tenant is not registered—but an unregistered tenant is not trespasser—Position of an unregistered tenant—Limitation.

PAGES.

SECTION 7 .. .. 84—86

Upon public sale, if security not tendered within one month, zamindar may attach—Attachment to have effect of trust—Zamindar must proceed under this section—If he does not act under this section or grant *amaldastak*, *patnidar* not liable for rent—Remedies open to a zamindar if a purchaser does not register—Two courses open to him.

SECTION 8 .. .. 86—108

Zamindar to be allowed periodical sales of tenures, in which right to sale for arrears is reserved—First sale to be applied for on 1st *Baisakh*—Mid-year sale to be applied for on 1st *Kartik*—Two classes of saleable tenures—Reg. VIII of 1819 speaks of tenures transferable by title-deeds—Reg. I of 1820 makes the tenures saleable free of incumbrances whether the sale is held under Reg. VIII or any other summary process—Bengal Act VIII of 1865 makes the rule applicable to tenures transferable by the established usage of the country—Chap. XIV of Bengal Tenancy Act also applicable to patni tenures—Ben. Act. VIII of 1865 makes the rule applicable to tenures transferable by the established usage of the country—Proceedings on an application for sale of a tenure analogous to the remedy by distress—Nowab Nazim's Debt Act—Board's proceedings—Who can apply for sale—Either proprietor or proprietors jointly or common manager must apply—Board's proceedings—Different if fractional proprietors enter into separate engagements with *patnidar*—Board's proceedings—Registration under Act VII (B. C.) of 1876, essential—Zamindar alone entitled to take steps under the Regulation—Board's proceedings—Application to be referred to the record-keeper—Whom should the zamindar proceed against—Zamindar need proceed only against recorded tenant—Whom should the application for sale be made to—Petition need be made to Collector only now—Board's proceedings—One petition only necessary—Board's proceedings—Date of presentation of petition—Sale at the beginning and middle of the *Fasli* year valid where that era prevails—Board's proceedings—The same view has been taken by High Court—Nor is the precise date mentioned in the Reg. essential—Board's rules—What should the petition contain—Specification of balances—Inclusion of interest and cesses—Board's proceedings—What should notices under clauses 2, 3 contain—Notice should specify lots—Publication of petition not a substantial process to be observed by zamindar—Publication of notices essential for validity of sale—Places where notice should be published—Original petition and original notice must be stuck up—Notice must be stuck up at some conspicuous place—Sticking up of notice during the office-hours sufficient—Notice must be stuck up at the date of sale—Due publication of notice essential—Publication must be at the

SECTION 8—(*contd.*) PAGES.

cutcherry or the principal town or village on the land of the defaulter—Personal service not sufficient—but sufficient if there is no cutcherry or principal town and village on defaulting patni—Notice must be served on patni in arrear—and at the cutcherry on the patni in arrear—Signature of three substantial persons necessary—"Substantial persons," meaning of—A substantial person is a respectable person of good character: He must live within a short distance of the cutcherry—Certificate must be obtained—"Certificate to this effect," meaning of—Observance of formalities in the mode of service directory only—but there must be proof that notices have been duly published—The law on the subject summed up—Notice must be published before the 15th *Bysak*—Object of the Legislature—Notice must be published before 15th *Bysak* or 15th *Kartic*, question as to whether—This rule does not apply to notice affixed at the Collectorate—Effect of defective service of notice of sale—Sale voidable and not void—Sale must take place on the date advertised or any subsequent date after due notice—*Onus* lies on the zamindar—Plea of non-service may be taken at any time.

SECTION 9 .. .. 108—111

Sale how conducted—Defaulter cannot bid—Defaulter includes recorded as well as unrecorded shareholder—Purchase by a defaulter only voidable—Zamindar or under-tenant can bid—Mortgagor can bid—Forfeiture of earnest money and realization of deficiency—Board's proceedings—Forfeiture need not be ordered immediately—but forfeiture is incurred as soon as default is made—Deficiency must be recovered by Civil Suit.

SECTION 10 .. .. 111—112

Forms to be observed in selling.

SECTION 11 .. .. 112—125

Tenure to be sold free of incumbrances by act of defaulter—No underlease to stand after-sale—Exception in favour of *bonâ fide* engagements with raiyats—Incumbrance, meaning of—Customary right to cut and appropriate tree—Incumbrance, instances of—Lease—Under-tenure—Exchange of land—Adverse possession—Mortgage—Occupancy or non-occupancy right—Incumbrances, annulment of—Chap. XIV of Bengal Tenancy Act applies also to patni sales—In either case purchaser entitled to avoid incumbrances—"Defaulting proprietor," meaning of—Incumbrances must have come into existence since patni—Registered and notified incumbrances—Inferior interest cannot be annulled before superior interest—Sale of a portion does not avoid incumbrances—Nor where several tenures are put up for sale in execution of one decree—Purchaser at a revenue-sale may transfer his rights to a *patnidar*—Incumbrances not void but voidable—Protected

SECTION 11—(*contd.*) PAGES.
interest—*Khudkast* raiyats protected——Distinction between *Khudkast* and *Paikast* raiyats—*Bonâ fide* engagements protected—Transfer made with permission protected—*Onus* as regards incumbrances—Limitation—Right to avoid incumbrances must be exercised within a reasonable time—Limitation in case of adverse possession—Principle—Adverse possession against auction-purchaser—Adverse possession when patni is surrendered—Limitation in case of arrears of rent.

SECTION 12 125
Above rule to take effect retrospectively—Proviso—Rule not to apply to private transfer.

SECTION 13 .. ..126—135
Reason for allowing under-tenants means of staying sale—How under-tenants may stay sale—Procedure in case of amount lodged being rent due from under-tenant—and in case of amount lodged being advanced from private funds—*Darpatnidar* or any other tenure-holder may pay—but must pay the whole of zamindar's rent unconditionally—Collector need not register his name as manager, Court of Wards, before selling patni—Board's proceedings—Defaulting *patnidar* must pay before date of sale if he does not contest arrears—Board's rule—If he contests he can pay when lot is called up—*Darpatnidar* must pay before the lot is put up—Remedies open to under-tenant making payment—(*i*) He is not entitled to set-off—(*ii*) Or he acquires a *lien* similar to a mortgage—S. 171, cl. (*c*) of Bengal Tenancy Act gives a similar *lien*—Difference between s. 13, cl.(4) of the Reg., and s. 171, cl.(*c*) of Bengal Tenancy Act—Depositor will be put in possession upon application—*Lien* a statutory one—Mortgage must be of the entire estate—Notice must be given to tenants—(*iii*) Depositor may bring a regular suit—(*iv*) Depositor may bring a suit to reverse sale—Amount advanced how to be liquidated—"Profits," meaning of—Collection-charges—Under-tenant cannot be ousted until debt paid off—but the *lien* is extinguished as the debt is paid off—but regular suit is not always necessary—Limitation—Jurisdiction.

SECTION 14 .. .. 135—154
Sale not to be stayed unless arrear claimed be lodged—but suit to lie for its reversal—Defaulter may apply for summary investigation—Sale not to be stayed unless amount claimed be deposited—Who can lodge the amount of demand—Contribution—S. 60 of the Contract Act—Shareholder paying entire rent is entitled to contribution—*Patnidar* paying Government revenue is entitled to contribution—Mortgagee of a share paying entire rent entitled to contribution—but not a purchaser paying arrears accruing before date of purchase—Nor a mortgagee in a similar case—In a contribution-suit joint decree cannot be passed—Limitation—Equity between co-sharers—Cases in which money

SECTION 14—(*contd.*) PAGES.

must be paid into Court—*Darpatnidar* must pay into Court—*Patnidar* must pay to zamindar—Board's rule—Board's proceedings—Two ways of staying a sale—Sale cannot be indefinitely stayed—Board's proceedings—Sale must be stayed on the statement of zamindari agent—Board's proceedings—Sale may proceed although there is a suit for the abatement of rent claimed pending in Civil Court—Board's proceedings—What happens when costs are demanded by zamindar—Board's proceedings—*Patnidar* may demand summary investigation—but sale cannot be stayed till the summary suit is decided—Board's proceedings—Scope of the summary investigation—Board's proceedings—Collector cannot review award—Board's proceedings—Patnidar may bring a suit to reverse a sale—Grounds on which a sale may be reversed—An unregistered defaulter or unregistered co-sharer of a defaulter may sue—Exact position of an unregistered tenant in such cases—One of several co-owners may sue—and an under tenure-holder—and a mortgagee—Who can reverse the sale—Board's rule—Purchaser must be indemnified against all losses—He is entitled to interest—and to costs—Purchaser entitled to be indemnified for payments of rent—Doubtful if purchaser can proceed against defaulting *patnidar* under s. 69 of the Contract Act—Auction-purchaser need not bring a fresh suit for his dues—He may proceed to execution when decree is passed—Zamindar liable to interest if he does not help purchaser in recovering his dues—Position of *patnidar* when sale is set aside—*Patnidar* liable to pay arrears for the period during which he was out of possession—but not when there is *mala fide* interference with tenants' possession by zemindar—*Patnidar* liable for rent for the period intervening sale and reversal—but not, if landlord refused to treat purchaser as tenant—Mesne profits—Causes of action—Form of suit for reversal of sale—Sale cannot be declared good or bad in part—Validity of sale cannot be attached collaterally—*Onus* lies on zamindar—Limitation of suit to set aside a sale—Limitation for arrears of rent when sale is set aside—Limitation where litigation is going on—Limitation where fraud is alleged—Limitation in a suit to recover co-sharers' share.

SECTION 15 .. .. .. 154—156

Delivery of possession to purchaser—Procedure in case of opposition by purchaser—Procedure in case of continued opposition—Extension of the Act—Sale when final—Confirmation necessary—Certificate need not be registered—When registration is refused purchaser must go to Civil Court—Payment of rent by auction-purchaser—Late Talukdar.

SECTION 16 156

Repealed by s. 2, Act VIII (B. C.) of 1865.

PAGES.

SECTION 17 .. .. 156—165

Disposal of proceeds of sale—One *per cent.* to be carried to the account of Government—Tenancy Act—Payment to zamindar—Zamindar's balance and expenses to be next made good—Mukhtear's and Revenue Agent's fees as charges—Board's procedings—Pleader's fees may also be charges—Rent as used in s. 169 of Bengal Tenancy Act includes interest—Zamindar must be paid in cash—Board's proceedings—Antecedent balances are personal debts—They are not a charge on the taluk sold—No charge on surplus sale-proceeds for rent of subsequent period—Disposal or remainder—Surplus sale-proceeds in the hands of Collector are property of defaulter—Distribution of sale-proceeds—Board's proceedings—Zamindar has no prior right—*Sepatnidar* not entitled to share in sale-proceeds—Mortgagee entitled to be paid from surplus sale-proceeds—Priority—but creditor bound to refund if sale is set aside—Under-tenants free to prosecute for price of their interest or compensation—Regular suit must be instituted to enforce claim—Form of suit for compensation—one suit must be brought for whole claim—Limitation—Suit not to lie if under-tenant be himself in arrear at time of sale—Under-tenant not entitled to compensation in arrear—Principle—*Darpatnidar* cannot claim damage if in arrear—Substantial compliance sufficient—When defaulter to receive excess unclaimed—Tenancy Act—Substitution of Government Security for cash in deposit.

SECTIONS 18—19 165

Repealed by Act X of 1859, *s.* 1.

REGULATION I OF 1820 .. .. 166—168

THE FORFEITED DEPOSITS ACT (XXV OF 1850) 169

THE RENT RECOVERY ACT (VI OF 1853).. .. .. 170—173

THE BENGAL RENT RECOVERY ACT [VIII (B. C.) of 1865] .. 174—195

TABLE OF CASES CITED.

PAGE.

Abdool Aziz Biswas *v.* Radha Kanta Kabiraj, I. L. R., 5 Cal., 226 155

Abdool Hosein *v.* Lal Chand Mahaton, 13 C. L. R., 313; I. L. R., 10 Cal., 36 45

Abdul Hamid *v.* Mohini Kanta Shaha, 4 C. W. N., 508 .. 26

Abdulla *v.* Umed Ali, 6 W. R., 321 148

Abhai Charan *v.* Sashi Bhusan Basu, I. L. R., 16 Cal., 155 .. 57

Abhai Kumar Sen *v.* Bejai Chand, I. L. R., 29 Cal., 813 .. 115

Abhiram Goswami *v.* Shyama Charan Nundi, I. L. R., 36 Cal., 1,003 (P. C.) 10

Adam *v.* Briggs Iron Company, 7 Cushing, 361 64

Adoo Meah *v.* Shiboo Sundari, 22 W. R., 295 27

Afsurooddeen *v.* Musst. Shorashi Bala, Marsh, 588. . .. 28, 32

Ahsanullah Khan Bahadur *v.* Hari Charan Mozumdar, I. L. R., 20 Cal., 86 : 17 Cal., 474 .. .. 92, 93, 101, 108

Ahsanullah Khan Bahadur *v.* Tirthabasini, I. L. R., 22 Cal., 680 .. .. 18, 20

Akhoy Kumar *v.* Maharajah Bejoy Chand, I. L. R., 29 Cal., 813 ; 6 C. W. N., cclix 121

Akhoy Kumar Chattopadhaya *v.* Mahatap Chand Bahadur, I. L. R., 5 Cal., 24 34

Alimoddin *v.* Sabir Khan, 8 W. R., 60 185

Ambika Debya *v.* Pranhari, 14 B. L. R., 77 (F. B.) ; 13 W. R., 1 (F. B.) 130, 132, 182

Ameenuddin *v.* Khyroonnessa, 20 W. R., 59 183

Amrita *v.* Bejoychand Mahatab, 1 C. L. J., 77*n*. .. 150

Amrita Lall Bagchi *v.* Jotindra Nath Chowdhry, I. L. R., 32 Cal., 165 8

Anánda Lall Mukherjee *v.* Kali Prasad Misser, 20 W. R., 59 182

Andrew *v.* Larimore, 1 Hay., 309 ; 2 Ind. Jur., O. S., 4 .. 136

Annada Charan Rai *v.* Kali Kumar Rai, I. L. R., 4 Cal., 89 56

Annada Pershad Panja *v.* Prosonnomoyi Dassi, 11 C. W. N., 817 ; I. L. R., 34 Cal., 711 154

PAGE.

Annoda *v.* Erskine, 12 B. L. R., 370 ; 12 W. R., 68 .. 146, 151
Annoda Charan Dass Biswas *v.* Mathura Nath Dass Biswas, I. L. R., 4 Cal., 800 ; 4 C. L. R., 6 .. 118, 190, 195
Anund Chunder *v.* Soobul Chunder, S. D. A., 1857, p. 1159 132
Aosubali Pramanik *v.* Bisseshuri, 8 C. L. J., 554 .. .. 54, 70
Apurva Churan Ghose *v.* Kooram Ali, 4 C. L. J., 527 ; 10 C. W. N., 527 19
Arsali Sadagar *v.* Ram Satya Bhakat, 7 C. L. J., 191 .. 195
Asadoollah *v.* Munshee, 22 W. R., 531 138
Asgar Ali *v.* Asabuddin Kazi, I. L. R., 9 C. W. N., 134 .. 83
Ashanoollah *v.* Shamsere, 4 C. L. R., 165 193
Ashutosh Dhar *v.* Amir Molla, 3 C. L. J., 337 19
Assanulla *v.* Mohini Mohan, I. L. R., 26 Cal., 739 .. 28
Assanulla Khan Bahadur *v.* Tirthabasini, I. L. R., 22 Cal., 680 18, 20
Asubali Pramanik *v.* Bisseshuri, 8 C. L. J., 554 .. .. 54, 70
Atulya Chandra Bosu *v.* Tulsi Dass Sarkar, 2 C. W. N., 543 .. 75
Azim *v.* Ram Lall Shaha, I. L. R., 25 Cal., 330 55

B

Bacharam Mukherjee *v.* Issur Chunder, W. R., Sp., 4 .. 107
Bahadur Sing *v.* Forbes, I. L. R., 35 Cal., 737 132
Baikanta Nath Sing *v.* Maharaj Dheraj Mahatab Chand Bahadur, 17 W. R., 447 147
Baikantha Nath *v.* Mahatab Chand, 9 B. L. R., 87 ; 17 W. R., 447 .. .. 94, 96
Baistab Chandra Bhadra *v.* Tara Chand Bannerjee, 11 W. R., 357 133
Baistab Charan Chowdhuri *v.* Akhil Chandra Chowdhury, 11 C. W. N., 217 57
Bajrangi Sing *v.* Monokarnika Bakhsh Sing, 12 C. W. N., 74 (P. C.) 6
Barada Kanta Rai *v.* Chandra Kanta Rai, 23 W. R., 280 .. 153
Barahi Debi *v.* Deb Kamini Debi, I. L. R., 20 Cal., 682 .. 60, 61
Barnamoyi Dasi *v.* Barnamoyi Chowdhurani, I. L. R., 23 Cal., 191 .. .. 125, 153
Barry *v.* Abdool Ali, W. R., Sp., 64 32
Basanta Kumari Debya *v.* Ashutosh Chukravarti, I. L. R., 27 Cal., 67 ; 4 C. W. W., 3 .. .. .. 15, 178
Basanto Kumar Roy Chowdhri *v.* Promotho Nath Bhattacharjee, I. L. R., 26 Cal., 130 ; 3 C. W. N., 36 75
Beakwith (W. J.) *v.* Thakoor Dass Gossain, 1 W. R., 74 .. 12
Behari Lall Seal *v.* Maharajadhiraj Bejoy Chand Mahatab, 10 C. W. N., 234*n*. 16

PAGE.

Bejoy Chand Mahatab *v.* Amrita Lall Mukherjee, I. L. R., 27 Cal., 308 .. .. .. 104, 147

Bejoy Chand Mahtab *v.* Atulya Chandra Bose. I. L. R., 32 Cal., 953 .. .. .. 93, 94, 95, 96

Bejoy Gopal Mukherjee *v.* Krishna Mahishi Debi, I. L. R., 34 Cal., 329 (P. C.) 5, 7, 8

Beni Madhab *v.* Joy Kishen, 12 W. R., 595 179

Beni Madhab Rai *v.* Joad Ali Sirkar, I. L. R., 17 Cal., 390 .. 69

Beni Madhub Banerjee *v.* Jai Krishna Mukherjee, 7 B. L. R., 152; 12 W. R., 495 .. .. .. 179, 180

Beni Madhab Ghose *v.* Thakur Das Mundal, B. L. R., 88 (F. B.) 6 W. R., Act X, 71 .. .. 5, 6

Beni Madhub Dass *v.* Jotindra Mohan Tagore, 11 C. W. N., 765 146

Beni Prosad Koeri *v.* Goberdhan Koeri, 6 C. W. N., 823 .. 58

Beni Prosad Koeri *v.* Ramdahin Pandey, 1 C. L. J., 90*n.*; 10 C. W. N., 216 58

Benode Lall Pakrashi *v.* Kalu Pramanic, I. L. R., 20 Cal., 708 41, 42, 43

Bepin Behari Kundu *v.* Durga Charan Bandopadhya, 12 C. W. N., 914 6

Bepin Behari Mitter *v.* Prokash Chandra Sarkar, 13 C. L. J., 148; 3 C. C. L., 327 19

Bhabani Charan Dutta *v.* Protap Chandra Ghose, 8 C. W. N., 575 68

Bhabani Nath Chukerbutty *v.* Land Acquisition Deputy Collector of Bogra, 7 C. W. N., 130 .. .. .. 29, 34

Bhagwan Chandra Roy *v.* Raj Chunder Roy, 8 W. R., 553.. 153

Bhagwan Dass *v.* Balgobind Sing, 1 B. L. R., S. N., 9 .. 179

Bhagwat Sahai *v.* Bepin Behari Mitter, I. L. R., 37 Cal., 918 (P. C.) 59, 60

Bhairab Chandra Chowdhury *v.* Okhil Chandra Chowdhury, 11 C. W. N., 217 121

Bharat Chandra *v.* Ganga Narain, 14 W. R., 21.. .. 57

Bhola Nath Ghosal *v.* Kedar Nath Bannerjee, 19 W. R., 106.. 192

Bhooban Mohun *v.* Watson & Co., W. R., Sp., 64.. .. 27

Bhowani Charan Chuckerbutty *v.* Land Acquisition Deputy Collector of Bogra, 7 C. W. N., 130 .. .. 29, 34

Bhuban *v.* Girish, 13 C. L. J., 339 152

Bhugwan Chunder Dass *v.* Suddr Ali, I. L. R., 4 Cal., 41 .. 102

Bibi Jarad Kumari *v.* Hanifuddin Akan, 14 C. W. N., 389 .. 51

Bibi Sohodwa *v.* Maxwell Smith, 20 W. R., 139 178

Bidhu Mukhi Debee *v.* Nilmoni Sing Deo, 1 C. L. R., 464 ..

Bindubashini Dassi *v.* Horendro Lall Roy, I. L. R., 25 Cal., 305 138

	Page.
Bipra Dass Dey *v.* Raja Ram Bandopadhya, 13 C. W. N., 650	69
Bipro Dass Pal Chowdhry *v.* Kumar Sonat Chandra Singh, 11 C. W. N., 161*n*.	38
Bishonath Sircar *v.* Rani Sornomoyi, 4 W. R., 5 ..	21
Bishumbhur *v.* Durga, S. D. A., 1858, p. 369	117
Bissonath Chunder *v.* Radha Kista, 11 W. R., 554 ; 1 Hay, 339 ; Marshal, 113	5
Bonomali Roy *v.* Jagat Chandra Bhowmic, I. L. R., 32 Cal., 669	7, 8
Bootee Sing *v.* Moorat Sing, 20 W. R., 478	177, 178
Brindaban Chandra Chowdhury *v.* Brindaban Chandra Chowdhury Sircar, L. R., 1 I. A., 178 ; 13 B. L. R., 409 ; 21 W. R., 324	53, 114
Brij Kumar Roy *v.* Dhanukdhari Raut, 10 C. W. N., 976 ..	146
Brojendro *v.* Krishna, I. L. R., 7 Cal., 684	45
Brojendro Kumar *v.* Upendro Narain, I. L. R., 8 Cal., 706 ..	27
Brojendro Kumar Rai *v.* Rakhal Chandra Rai, I. L. R., 3 Cal., 791	153
Brojo Kishori *v.* Muhammad Salim, 10 W. R., 151 ..	10
Brojo Nath Pal Chowdhry *v.* Hira Lall Pal, 1 B. L. R., A. C., 87 ; 10 W. R., 120	31, 32
Brojo Nath Sing *v.* Srimati Bhagabati Dassi, 1 W. R., 133 ..	133
Brojo Sundari *v.* Fatik Chandra Roy, 17 W. R., 407 ..	115
Bunwari Lall Chowdhury *v.* Barnomoyi Dassi, I. L. R., 14 Cal., 749	37
Bunwari Lall Roy *v.* Mohima Chunder Koonal, W. R., 267 ..	7
Bunwari Mukunda Deb *v.* Bidhu Sundan Thakur, 12 C. W. N., 459	39, 44
Bykunt *v.* Monee, S. D. A., 1850, p. 89	110

C

Chandra Sakai *v.* Kali Prosunno Chuckerbutty, I. L. R., 23 Cal., 354	115
Chander Kumar Rai *v.* Peary Lall, 6 W. R., 190	178, 179
Chander Nath Nundi *v.* Hur Narain Deb, I. L. R., 7 Cal., 153 ..	59
Chander Pershad Roy *v.* Subhodra Kumari Shaheba, I. L. R., 12 Cal., 622	145
Chandermoni *v.* Debendranath, Marsh, 420	24
Chander Monee *v.* Shumbhoo, W. R., Sp., 270	71
Chandra Kumar Roy *v.* Kedarmoni Dasi, 7 W. R., 274 ..	179
Chandy Prasad *v.* Shubhadra, I. L. R., 12 Cal., 622 ..	83
Collector of Rajshahie *v.* Hara Sundari Debi, W. R., Sp., Act X, 6	55
Chooramoni *v.* Howrah Mills Company, I. L. R., 11 Cal., 696 ..	27

D

	Page.
Damodar Roy *v.* Nimanund Chuckerbutty, 15 W. R., 365 ..	186
Darimta Debiya *v.* Nilmoni Sing Deo, 15 W. R., 180 ..	156
David *v.* Ramdhon Chatterjee, 6 W. R., Act X, 97 ..	26
Dayamani Debi *v.* Srinibash Kundu, I. L. R., 33 Cal., 842 ..	5
Daya Ram *v.* Bhobindur Narain, S. D. A., 1806, p. 139 ..	52
Deanatullah *v.* Nazar Ali Khan, 1 B. L. R., A. C., 216 ; 10 W. R., 341	67
Deen Doyal *v.* Jogeshwar, Marsh., 252	77
Dhanpat Singh *v.* Saraswati Misrain, I. L. R., 19 Cal., 267 ..	148, 153
Dhunendro Chundro Mukherjee *v.* John Watson Laidloy, 20 W. R., 400	14
Dhunput Sing Doogur Roy Bahadur *v.* Sheik Jowahurally, 8 W. R., 152	46
Digbijoy Neogi *v.* Jadub Chander Thakur, 8 W. R., 181 ..	151
Din Dayal Paramanick *v.* Radha Kishori Debi, 8 B. L. R., 536 ; 17 W. R., 415	153
Dinendra *v.* Tituram, I. L. R., 30 Cal., 301 ; 7 C. W. N., 810 ..	36
Dinomonee Banerjee *v.* Gyrutullah Khan, 2 W. R., 138 ..	63
Doorga Nath Roy *v.* Ram Chandra Sen, I. L. R., 2 Cal., 341 ; L. R., 4 I. A., 52	10
Donbijoy Mahton *v.* Prithee Narain Sing, 14 W. R., 30 ..	185
Doya Chand *v.* Anund Chunder, I. L. R., 14 Cal., 382 ..	181
Durgacharan *v.* Ananda Moyee, 3 W. R., 127	193
Durga Charan Surma *v.* Syed Najumoddin, 21 W. R., 397 ..	107
Durga Prosad Bandapadhya *v.* Brindaban Roy, I. L. R., 19 Cal., 504	24
Durga Prosad *v.* Bindabun, 15 W. R., 274	179
Durga Prosad Bandopadhya *v.* Brindaban Roy, I. L. R., 19 Cal., 504	46, 47
Dwarka Nath *v.* Bhowanee Kishore, 8 W. R., 11 ..	45
Dwarka Nath Chuckerbutty *v.* Bhowani Kishen Chuckerbutty, 8 W. R., 11	76
Dwarkanath *v.* Harish Chandra, I. L. R., 4 Cal., 925	179, 181
Dwarka Nath *v.* Srigopal, 5 W. R., 240	71

E

Earl of Jersey *v.* Guardians of Poor, 22 Q. B. D., 555 ..	64
Eastern Mortgage Agency Company *v.* Rai Ganpat Sing Bahadur, 9 C. W. N., 22 (S. N.)	19
Ebbs *v.* Boulnois	18
Eman Ali Mistri *v.* Atar Ali Khan, 22 W. R., 133 ..	193
Enayet Hossein *v.* Bibi Khoobunnissa, 9 W. R., 246	31

PAGE.

Erskine *v.* Trilochan Chatterjee, 9 W. R., 518 .. .. 21, 23
Eshan Chandra Kar *v.* Madhab Chundra Ghose (unrep.) .. 16
Eshan Chunder Mozumdar *v.* Hurrish Chandra Ghose, 21 W. R., 137 192

F

Faiz Rahaman *v.* Ram Sukh Bajpai, I. L. R., 21 Cal., 169 .. 67
Fatik Chandra De *v.* Foley, I. L. R., 15 Cal., 492 68
Fatima *v.* Collector of Tipperah, 13 W. R., 433 184
Fox *v.* Mackreth, 2 R. R., 55 64
Fukeer *v.* Hills, 8 Sel. Rep., 153 110

G

Gangadhar Sircar *v.* Khaja Abdul Aziz, 14 C. W. N., 128 .. 146, 152
Gandoo Mahata *v.* Nilmonee Singh Deo, 1 C. L. J., 526 .. 65, 66
Girish Chunder *v.* Hem Chunder, 2 C. L. J., 21*n.*; 5 C. L. J., 28 39
Girish Chunder Mandal *v.* Durga Dass, I. L. R., 5 Cal., 494 .. 160
Golam Ali *v.* Kali Krishna, I. L. R., 7 Cal., 479 ; 8 C. L. R., 517 27
Goluk Moni *v.* Haro Chunder, 8 W. R., 62 115
Gopal Chunder *v.* Umesh Narain, I. L. R., 17 Cal., 695 .. 28
Gopal Chunder Chuckerbutty *v.* Udoylall Dey, 10 W. R., 115 136
Gopal Krishna Soor *v.* Madan Mohan Haldar, 2 W. R., 188 .. 98
Gopanund Jha *v.* Lalla Govind Pershad, 12 W. R., 109 .. 31
Gopendra Chandra Mitter *v.* Mokaddam Hossein, I. L. R., 21 Cal., 702 .. .. 114, 115, 117, 156
Gopendra Chandra Mitter *v.* Tara Prosunno Mukherjee, I. L. R., 37 Cal., 598 .. .. 40, 41
Gopi Mohon *v.* Hill, 5 C. L. R., 33 27
Gooroo Das *v.* Issur Chunder, 22 W. R., 246 26
Gossain Mongal Dass *v.* Babu Roy Dhunput Singh, 25 W. R., 152 .. .. 83, 145
Gosto Behari Pyne *v.* Shib Nath Dutt, I. L. R., 20 Cal., 241 .. 161
Gouree Sunkar Roy *v.* Anund Mohan Moitro, 9 W. R., 487 .. 56
Gouri Kanta Bhattacharjee *v.* Raj Kishen Nath, 5 W. R., 106 109
Gouri Lall Sing *v.* Judisthir Hazra, I. L. R., 1 Cal., 359 .. 96
Gour Mohan *v.* Ananda, 22 W. R., 295 57
Gour Mohun Roy *v.* Radha Raman Sing, 21 W. R., 372 .. 76
Govind v. Rungo, I. L. R., 6 Cal., 60 84
Govind Chandra Bose *v. Alimoddin, 11* W. R., *160* .. 118, 194
Govind Lall v. Chand Haree, I. L. R., 9 Cal., 172 .. 96
Govinda Nath Shaha Chowdhury *v.* Surja Kanta Lahiri, I. L. R., 26 Cal., 460 70

PAGE.

Govinda Nath Shah Chowdhury *v.* Surja Kantha Lahiri, I. L. R., 26 Cal., 460 124
Govind Sahai *v.* Sibdut Ram, I. L. R., 33 Cal., 878 .. 161
Govinda Sundari Sinha Chowdhury *v.* Srikrishna Chakravarti, 10 C. L. J., 538 82
Govinda Sundar Sinha Chowdhury *v.* Srikrishan Chakravarti, 10 C. L. J., 538 150
Gudadhur Dass *v.* Dhanput Singh, I. L. R., 7 Cal., 565 .. 36, 37
Gulamali *v.* Gopal Lall Thakur, 9 W. R., 65 26
Gunga *v.* Dam Ram Naryan, 7 W. R., 183 (F. B.) .. 187
Gyanada Kanta Roy Bahadur *v.* Bromomoyi Dassi, I. L. R., 17 Cal., 162 47
Gyanada Kumar Roy Bahadur *v.* Bromomoyi Dassi, I. L. R., 17 Cal., 162 .. .. 80, 86
Gya Ram Mandal *v.* Gya Ram Naik, Wy. Rent Rep., 51 .. 44

H

Hanooman Proshad Sing *v.* Musst. Babooee Munraj Koonwaree, 6 M. I. A., 393.. 5
Harak Chand *v.* Bejoy Chand Mahtab, 2 C. L. J., 87 ; 9 C. W. N., 795 .. .. 124, 195
Harak Chand Babu *v.* Charu Chandra Singh, 15 C. W. N., 15 ; 3 C. C. L., 81 .. .. .. 44, 84, 110
Hara Narayan *v.* Wooma Charan, 19 W. R., 169 .. 191
Haran Chandra Ghose *v.* Guru Charan Sircar, 14 W. R., 421 120
Hara Prasad *v.* Sheodayal, I. L. R., 26 Cal., 55 ; L. R., 3 I. A., 285 179
Hara Sundari *v.* Gopi Sundari, 10 C. L. R., 550 27
Hargovind *v.* Damante, 13 W. R., 304 184
Hari Charan Basu *v.* Ranjit Singh, 1 C. W. N., 521 ; I. L. R., 25 Cal., 917 69
Hari Dass Goswami *v.* Nistarini Gupta, 5 C. L. J., 30 .. 40, 41
Harihar Mukherjee *v.* Tincourie Dassi, 6 W. R., 170 .. 154
Harinarain Mozumdar *v.* Mukund Lall Mandal, 4 C. W. N., 814 .. .. 39, 40, 41, 42
Hari Narain Singh Deo *v.* Sriram Chakravarti, I. L. R., 33 Cal., 54 ; 3 C. L. J., 59 64
Harish Chandra Rai *v.* Collector of Jessore, I. L. R., 3 Cal., 712 67
Haro Krishna Banerjee *v.* Joy Krishna Mukerjee, 1 W. R., 299 30
Haro Kumar Ghose *v.* Kali Krishna Thakur, I. L. R., 17 Cal., 251 153
Haronath Rai *v.* Golok Nath, 19 W. R., 18 153

PAGE.

Haro Prosad Rai *v.* Gopal Dass Dutt, I. L. R., 3 Cal., 817 ; I. L. R., 9 Cal., 250 153
Harris *v.* Ryling, 5 M. & W., 60 ; 52 R. R., 632 64
Hasan Ali *v.* Mehdi Hossein, I. L. R., 1 All., 533 .. 9
Hayes *v.* Horendro Narain, I. L. R., 31 Cal., 698 .. 6, 7
Hayes *v.* Rudranund Thakur, I. L. R., 34 Cal., 381 .. 11, 92
Hemadri Nath Khan *v.* Ramani Kanta Roy, I. L. R., 24 Cal., 575 .. .. 58, 60
Hem Chandra Chowdhurani *v.* Kali Prosunno Bhaduri, 8 C. W. N., 1 153
Hem Chunder *v.* Surnomoyi, I. L. R., 22 Cal., 354 .. 6
Hemendra Nath Mukerjee *v.* Kumar Nath Roy, I. L. R., 32 Cal., 169 16
Hem Nath Dutt *v.* Ashgar Sirdar, I. L. R., 4 Cal., 894 .. 28
Henry Buckland *v.* Ashoo Chowdhrain, 9 W. R., 326 .. 186
Hill *v.* Iswar Ghose, W. R., F. B., 156 180
Hira Lal Pal *v.* Nilmoni Pal, 20 W. R., 383 70
Hridoy Nath Dass Chowdhury *v.* Krishna Prasad Sircar, 11 C. W. N., 497 .. .. 69, 118
Huro Mohan Giree *v.* Durga Charan Rai, 15 W. R., 319 191
Huro Nath Gupta *v.* Jagannath Roy Chowdhury, 11 W. R., 87 104
Huro Sundari Dossya *v.* Kishen Monee Chowdhurani, 13 W. R., 257 191
Hurrodoyal Roy Chowdhury *v.* Mahamad Gazi Chowdhury, I. L. R., 19 Cal., 699 .. .. .. 103, 107, 108
Hurry Kisto Roy *v.* Motee Lall Nundee, 14 W. R., 36 .. 97

I

Ishan *v.* Chandra, I. L. R., 6 Cal., 70 84
Ishan Chandra Kar *v.* Madhab Chandra Ghose (unreported) .. 116
Ishan Chandra Mitra *v.* Ram Runjan Chackravarti, 2 C. L. J., 25 26
Ishan Chandra Rai *v.* Ashanullah, 8 B. L. R., 537*n* ; 16 W. R., 79 153
Ishan Chandra Rai Pandah *v.* Tarini Prosad Ghose, 2 Sevestre's Rep., 84 164
Ishan Chandra Sirkar *v.* Beni Madhab Sircar, I. L. R., 24 Cal., 62 83
Ishan Chunder *v.* Basaruddin, 5 C. L. R., 132 45
Ishar Chandra Datta *v.* Ram Krishna Dass, I. L. R., 5 Cal., 902 ; 6 C. L. R., 421 46

PAGE.

Issur Chandra Chuckerbutty *v.* Bistoo Chunder Chuckerbutty, 12 W. R., 32 190
Iswar Chunder *v.* Bistu Chunder, 3 B. L. R., App., 79 .. 194

J

Jadoo *v.* Nabo, 3 W. R., 2 163
Jadoo Nath Pal *v.* Prosunno Nath Dutt, 9 W. R., 71 .. 74
Jadoo Nath Shah *v.* Jadab Chundra Thakoor, 11 W. R., 294 53, 56
Jadub Chander Thakoor *v.* Bhola Nath Singh Roy, 5 W. R., 51 76
Jaikrishna Mukherjee *v.* Collector of East Burdwan, 1 W. R., 26 (P. C.); 10 M. I. A., 15 38
Jaikrishna Mukherjee *v.* Durga Narain Nag, 11 W. R., 348 .. 181
Jamila Khatun *v.* Pagal Ram, 1 W. R., 250 179
Janaki *v.* Nobin, 22 W. R., Act X, 33 25
Jarad Kumari (Bibi) *v.* Hanifuddin Akan, 14 C. W. N., 389 .. 51
Jibanti Nath Khan *v.* Gokul Chandra Chowdhuri, I. L. R., 19 Cal., 760 62
Jillar Rahaman *v.* Bejoy Chand Mahtab, I. L. R., 28 Cal., 293 21
Jnanada Sundari Chowdhurani *v.* Atul Chandra Chakravarti, I. L. R., 32 Cal., 972 16
Jnanendro Mohon Chowdhuri *v.* Gopal Dass Chowdhuri, I. L. R., 31 Cal., 1026; 8 C. W. N., 923 58
Jogemaya Dassi *v.* Girindra Nath Mukherjee, 4 C. W. N., 590 54, 156
Jogeshwar Mozumdar *v.* Abed Mahomed Sikdar, 3 C. W. N., 13 .. .. 114, 115, 120
Joki Lall *v.* Narsing Narain Singh, 4 W. R., Act X, 5 .. 67
Jonab Ali *v.* Rakibuddin Mullick, 1 C. L. J., 303 .. 42
Jones *v.* Barnett, 1 Ch., 611 119
Jorra Gazi *v.* Aboo Khalifa, 21 W. R., 427 10
Jotindra *v.* Debendro, 2 C. L. R., 419 110
Jotindra Mohan Tagore *v.* Brojo Sundari Debee, 1 W. R., 262 10
Jotindro Mohon Tagore *v.* Jurao Kumari, I. L. R., 33 Cal., 140 17
Jotindro Mohon Tagore *v.* Kishen Moni Debee, W. R., Sp., 11 14
Jotindro Nath Chowdhuri *v.* Prosunno Kumar Banerjee, 15 C. W. N., 74; 3 C. C. L., 76 28
Joy Kishen *v.* Durga Narain, 11 W. R., 348 178
Joy Kishen *v.* Raj Kishen, 1 W. R., 153 177
Joy Kishen Mukherjee *v.* Janki Nath Mukherjee, 17 W. R., 470 .. .. 23, 82, 85
Joy Kishen Mukherjee *v.* Reazoonessa Begum, 4 W. R., 40 .. 34

PAGE.

Joy Kishna Mukopadhya *v.* Surfanessa, I. L. R., 15 Cal., 345 .. 14, 51, 83, 145
Joymohun *v.* Edulji, I. L. R., 22 Bom., 7 5
Jugal Moni Dassi *v.* Sreenath Chatterjee, 12 C. L. J., 609; 3 C. C. L., 39 79
Jugernath *v.* Jumnan, I. L. R., 29 Cal., 247 28
Jukhomall Mehera *v.* Saroda Prosad Roy, 7 C. L. J., 604 .. 130, 134
Jyoti Prokash Nundi *v.* Jogendra Narain Roy, 11 C. W. N., 52*n* 29, 35
Jyoti Prosad Singh *v.* Lachipur Coal Company, I. L. R., 38 Cal., 845 65

K

Kalee Chunder *v.* Ramgutty, 25 W. R., 95 56
Kali Kishen Mukherjee *v.* Maharajah of Burdwan, 3 W. R., 39 127
Kali Sundari Debya *v.* Dharani Kanta Lahiri, 10 C. W. N., 172; I. L. R., 33 Cal., 279 .. .. 55, 57
Kameshwar Pershad *v.* Run Bahadur Sing, I. L. R., 6 Cal., 843 5
Kanai Lall Khan *v.* Midnapore Zamindari Co., 5 C. L. J., 48*n* .. 35
Kanti Chunder Mukherjee *v.* Baman Dass Mukherjee, 25 W. R., 434 134
Karim Khan *v.* Brojonath, I. L. R., 22 Cal., 244 115
Kartic Sarma *v.* Baidonath, 10 W. R., 205 182
Karunamoy *v.* Surendra Nath, 2 C. W. N., 327 156
Kasim Sheik *v.* Kumar Mukherjee, I. L. R., 33 Cal., 596 .. 39
Kazi Newaz Khoda *v.* Ram Jadu Dey, I. L. R., 34 Cal., 109 39, 40, 43
Kerr *v.* Pawson, 25 Beav., 394 64
Keshab Chandra Roy *v.* Brindaban Chandra Maitra, 14 C. W. N., 601 12
Khaja Ashanoollah *v.* Kalee Mohun Mukherjee, 18 W. R., 468 52
Khantamoni Dassi *v.* Bejoy Chand Mahtab, I. L. R., 19 Cal., 787 .. .. 115, 124
Khettro Mohan Pal *v.* Pran Krishna Kabiraj, 3 C. W. N., 371 .. 81
Khoda Bux *v.* Degumbari, W. R., Sp., 209 138
Kishore *v.* Kalu, 20 W. R., 33 110
Kishore Bulluv Mitter *v.* Bistoo Chandra Ghose, 12 W. R., 188 11
Kishori Raman Kapuria *v.* Ananta Ram Laha, 10 C. W. N., 270 54
Kisto Jiban Bakshi *v.* A. B. Mackintosh, W. R., Sp., 53 .. 82, 136
Kisto Kamini Chowdhurani *v.* Gopi Mohan Ghose Hazra, I. L. R., 15 Cal., 652 135

PAGE.

Kisto Mohon Shaha *v.* Abtabuddin Mahomed, 15 W. R., 560 .. .. 140, 143
Komol Lochon Dass *v.* Dwarka Nath Chowdhury, 10 W. R., 254 13
Koontee Debee *v.* Hridoy Nath Durreepa, 16 W. R., 206 .. 192
Koylash Chandra Banerjee *v.* Kali Prosunno Chowdhury, 16 W. R., 80 .. .. 110, 140
Koylash Chunder *v.* Jabur Ali, 22 W. R., 29 118
Kripamayi *v.* Durgagobind, I. L. R., 15 Cal., 89 181
Krishna Chandra Bose *v.* Mohendro Nath Bose, 13 C. L. J., 212 ; 3 C. C. L., 410 20
Krishna Chander Sen *v.* Sushila Sundari Dassi, I. L. R., 26 Cal., 611 .. .. 18, 75
Krishna Kinkar Dutta *v.* Mahanta Bhagwan Dass, 2 C. W. N., 161 43
Kristo Mohan Shaha *v.* Aftaboodeen Mahomed, 15 W. R., 560 89
Kumar Bunwari Mukunda Deb *v.* Bidhu Sundon Thakur, 12 C. W. N., 459 .. .. 39, 44
Kumar Dinendra *v.* Tituram, I. L. R., 30 Cal., 801 ; 7 C. W. N., 810 36
Kumar Keshab Chandra Roy *v.* Brindaban Chandra Maitra, 14 C. W. N., 601 12
Kupil Rai *v.* Radha Porsad Sing, I. L. R., 5 All., 261 .. 180

L

Lachman Rai *v.* Akbar Khan, I. L. R., 1 All., 409 .. 179, 180
Lachmipat Singh *v.* Sadatulla Nasya, I. L. R., 9 Cal., 698 ; 12 C. L. R., 382 .. .. 179, 180
Lakhi Narain *v.* Khetra Pal, 13 B. L. R., 146 (P. C.) 73, 74, 76, 80, 83, 85, 86, 132
Lakhinarain Mitter *v.* Seetanath Ghose, 6 W. R., Act X, 8 .. 72, 132
Lakhi Priya Chowdhurani *v.* Rama Kanta Shaha, I. L. R., 30 Cal., 440 163
Lakhi Priya Debya *v.* Brindaban Dey, 12 W. R., 313 .. 182
Lala *v.* Hira Singh, I. L. R., 2 All., 49 179
Lala Bhairab Chunder *v.* Lalit Mohon Roy Sing, I. L. R., 12 Cal., 185 132
Lala Jyoti Prokash Nandi *v.* Jogendra Narain Roy, 11 C. W. N., 52*n* 29, 33
Lalan Moni *v.* Sona Moni, 22 W. R., 34 57
Lalit Mohan Roy *v.* Benodai Debee, I. L. R., 14 Cal., 14 .. 67
Lalit Mohan Shaha *v.* Srinibas Sen, I. L. R., 13 Cal., 331 .. 129
Lall Sabil *v.* Goodur Khan, 22 W. R., 187 185

PAGE.

Latfunissa Begum *v.* Kowar Ram Chandra, S. D. A., 1849, p. 371 97
Loke Nath Ghose *v.* Jagabandhu Roy, I. L. R., 1 Cal., 297 .. 63
Lokenath *v.* Jagabandhu, I. L. R., 1 Cal., 297 77
Lukhee Narain *v.* Sita Nath, 6 W. R., Act X, 8 129
Lukhi Narain Mitter *v.* Khetra Pal Singh, 15 W. R., 125 ; 20 W. R., 380 (P. C.) ; 13 B. L. R., 146 ; 2 P. C. R., 903 73, 74, 76, 80, 83, 85, 86, 32
Lukhmee *v.* Collector of Rajshahie, S. D. A., 1851, p. 116 .. 115

M

Mabatulla Nasyar *v.* Nalini Sundari Gutpa, 2 C. L. J., 377 .. 81
Mackenzie *v.* Haji Syed Mahomed Ali Khan, I. L. R., 17 Cal., 469 125
Madhabanand *v.* Joy Kumari, 3 W. R., 201 164
Madhab Ram *v.* Doyal Chandra Ghose, 2 C. W. N., 108 ; I. L. R., 25 Cal., 445 .. .. 54, 55
Madhu Sudhan Koondoo *v.* Ram Dhan Ganguli, 12 W. R., 383 ; 3 B. L. R., 431 119
Madhu Sudhan Sing *v.* E. G. Rooke, I. L. R., 25 Cal., 1 (P. C.) ; L. R., 6 C. W. N., 433 .. .. .. 6, 7
Madon Mohon Shaha *v.* Sookomoyee Chowdhrani, W. R., Sp., Act X, 109 18
Mofazzul Hossein *v.* Basid Sheik, I. L. R., 34 Cal., 36 ; 4 C. L. J., 485 ; 11 C. W. N., 71 9
Mofizuddin Sirdar *v.* Ashutosh Chuckerbutty, 14 C. W. N., 352 117
Mohanand Sahai *v.* Musst. Sayedunessa, 12 C. W. N., 154 .. 19, 20
Moharini Dasya *v.* Horendro Lall Rai, 1 C. W. N., 458 .. 67
Mohendro Ram Tewari *v.* Ram Krishna Rai, 10 C. W. N., ccliii 69
Mohesh Chandra Chakladar *v.* Gangamoni Dasi, 18 W. R., 59 153
Mohesh Chandra Bannerjee *v.* Ram Prosunno Chowdhury, I. L. R., 4 Cal., 539 136
Mohim Chunder Mozumdar *v.* Jotirmoy Ghose, 4 C. L. R., 422 115, 118
Mohinee *v.* Juggobondhu, W. R., Sp., 382 101
Mohiooddeen Mahomed *v.* Ram Kishore Koondoo, 22 W. R., 311 191
Mohun Lall Babu *v.* Udai Narain Bhaduri, 14 C. W. N., 103 109, 110
Molook Chand *v.* Modu Sudan, 16 W. R., 126 45
Mongal Dass *v.* Balu Roy Dhanpat Sing Bahadur, 22 W. R., 152 145
Monmohini Dassi *v.* Musst. Bishen Moyi Dassi, 7 W. R., 112 46

PAGE.

Monmotha Nath Dey *v.* G. Glascott, 2 W. R., 275 .. 70
Moti Lall Ghose *v.* Bisheshwar Hazra, 3 C. W. N., 60 .. 160
Moti Lall Sing *v.* Sheik Omar Ali, 3 C. W. N., 19 .. 82
Moteram *v.* Bhivraj, I. L. R., 20 Bom., 745 184
Mritanjai Sarkar *v.* Gopal Chandra Sarkar, 2 B. L. R., A. C., 131; 10 W. R., 466 24
Mukund Chunder Roy *v.* Pran Kishen Pal Chowdhury, W. R., Sp., 287 33
Mukund Lall Pal *v.* Lehuraux, I. L. R., 20 Cal., 379 .. 58, 59
Mungazee Chuprasi *v.* Shiba Sundari, 22 W. R., 369 .. 97, 144
Mussamat *v.* Luckeemoni, S. D. A., 1850, p. 349 .. 115
Musst. Mesraw *v.* Girja Nundun Tewary, 12 C. W. N., 857 .. 9

N

Nadiar Chand Shaha *v.* Miajan, I. L. R., 10 Cal., 820 .. 26
Nafar Chand Pal Chowdhury *v.* Rajendra Lall Goswami, I. L. R., 25 Cal., 157 .. .. 115, 124
Nagendra Nath Pal Chowdhry *v.* Chandra Sekhar Dalal, 5 C. L. J., 59 147
Nanda Kumar *v.* Lakhi Prya, 23 W. R., 36 179
Naimuddin *v.* Girish Chandra Ghose, 5 C. W. N., 124 .. 69
Narainuddin *v.* Srimanta Ghose, I. L. R., 29 Cal., 219 .. 69
Narayan Chandra Kansabanik *v.* Kashishwar Roy, 1 C. L. J., 579 118
Narendro Narain Choudry *v.* Ishan Chandra Sen, 22 W. R., 22; 13 B. L. R., 274 .. .. 177, 181
Nidhi Kisto *v.* Nistarini, 21 W. R., 386 179
Nil Madhub Karmakar *v.* Shiboo Paul, 13 W. R., 410 .. 192
Nilmoney Roy *v.* James Hills, 4 W. R., Act X, 38 .. 130
Nilmoni Rai *v.* Hills, 4 W. R., Act X, 38 55
Nilmoni Singh *v.* Annoda Prosad, 1 B. L. R., 97 (F. B.); 10 W. R., 41 (F. B.) 32, 34
Nilmoni Singh *v.* Messrs. Gordon Stuart & Co., 9 W. R., 371 33
Nilmoni Singh Deo *v.* Saroda Prosad Mukherjee, 18 W. R., 434 31
Nitya Gopal Sen *v.* Mani Chandra Chakrabutty, 12 C. W. N., 63 10
Nitya Nund Hazra *v.* Maharajadhiraj Bijoy Chand Mahtab, 7 C. L. J., 593 40
Nobin Chunder *v.* Nobin Chunder, 23 W. R., 46 .. 194
Nobin Chunder *v.* Taylor, I. L. R., 4 Cal., 103 115

PAGE

Nobin Krishna Mookherjee *v.* Shib Prosad Patak, 8 W. R., 96 74, 83
Nobo Durga Dassi *v.* Nobo Koomar Roy, 5 W. R., 232 .. 33
Nobogopal Sircar *v.* Srinath Bandopadhya, I. L. R., 8 Cal., 877 ; 11 C. L. R., 37 128
Nobo Keshore *v.* Hàri Nath, I. L. R., 10 Cal., 1102 .. 6
Nobo Kishen *v.* Sreeram, 15 W. R., 255 57
Nobo Kishur Biswas *v.* Jadub Chunder Sircar, 20 W. R., 426 192
Noffer Ali *v.* Rameshwar, 3 C. L. R., 28 150
Nogendro Chandra Ghose *v.* Munsruff Bibi, 15 W. R., 17 .. .. 185, 186
Norendra Kumar Ghose *v.* Gora Chand Joddar, I. L. R., 33 Cal., 683 ; 3 C. L. J., 391 20
Nukoo Roy *v.* Mahabir Persad, 11 W. R., 405 177
Nunda Lall Mukherjee *v.* Kymuddin Sardar, 9 C. W. N., 886 29

O

Obhoy Ram Jana *v.* Syed Mahomed Hossein, W. R., Sp., 213 44, 51
Okhoy Kumar Chatterjee *v.* Mahtab Chand Bahadur, 22 W. R., 299 .. .. 73, 76, 83

P

Parbati Charan Deb *v.* Ainuddin, I. L. R., 7 Cal., 577 .. 60
Pasupati Mahapatra *v.* Narayni Dasi, I. L. R., 24 Cal., 537 ; 1 C. W. N., 519 .. .. .. 115, 1307
Pearce *v.* Meer, S. D. A., 1857, p. 1310 117
Peary Mohan *v.* Aftab Chand, 10 C. L. R., 526 31
Peary Mohan *v.* Gopal Paik, 2 C. W. N., 375 ; I. L. R., 25 Cal., 531 57
Peary Mohan *v.* Raj Kishen, 20 W. R., 385 45
Peary Mohun Mukhopadhya *v.* Sreeram Chandra Bose, 6 C. W. N., 749 .. .. 67, 158
Piari Mohon Mukherjee *v.* Ram Chandra Bose, 6 C. W. N., lxxxviii 66
Pitambar Chuckerbutty *v.* Bhairab Nath Palit, 15 W. R., 52 139
Pitambar Panda *v.* Damodar Dass, 24 W. R., 129 .. 91, 102
Poresh Nath Roy *v.* Bisho Nath Dutt, W. R., Sp., Act X, 16 56
Pradyote Kumar Tagore *v.* Gopi Krishna Mundal, I. L. R., 37 Cal., 322 .. .. 114, 120
Pralhad *v.* Kedar Nath Bose, I. L. R., 25 Cal., 302 .. 26
Pramada Nath Roy *v.* Romoni Kanta Roy, I. L. R., 35 Cal., 331 ; 11 C. W. N., 983 ; 7 C. L. J., 139 (P. C.) .. 70
Pramatha Nath Mitter *v.* Kali Prosunno Chowdhury, I. L. R., 28 Cal., 745 13

PAGE.

Pran Kristo De *v.* Bissumber Sen, 11 W. R., 80 63
Prem Chand Chowdhury *v.* Saraj Ranjan Chowdhury, 1 C L. J., 102*n* 152
Preolall Gosswami *v.* Gyan Tarungini, 13 W. R., 161 .. 148
Prescott *v.* Trueman, 4 Mass., 627 ; 3 Am. Dec., 249 .. 114
Prince Mahomed Bukhtyar Shah *v.* Rani Dhojamoni, 2 C. L. J., 20 63
Probhat Chandra Mukherjee *v.* Jadupati Chakravarti, I. L. R., 34 Cal., 724 ; 6 C. L. J.. 26 161
Promotho Nath Mitter *v.* Kali Prosunno Chowdhury, I. L. R., 28 Cal., 744 62
Prosunno *v.* Jogut, 3. C. L. R., 159 62
Prosunno Coomari Dassya *v.* Sundar Coomari Debya, 2 W. R., Act X, 30 34
Prosunno Coomar Pal Chowdhury *v.* Kailash Chandra Pal Choudhury, 8 W. R., 428 12
Prosonno Moyi Dassi *v.* Sundari Coomari Debya, 2 W. R., Act X, 30 29
Pudmanand *v.* Baijnath, I. L. R., 15 Cal., 828 19
Puhlwan *v.* Moheshwar, 18 W. R., 5 (P. C.) 26
Purmanandas Jeewandas, *In re*, I. L. R., 7 Bom., 109 .. 63
Purusotam Bose *v.* Khetro Prosad Bose, 5 C. L. J., 143 .. 39, 40

R

Radha Kanta Shaha *v.* Bipro Dass Roy, 1 C. L. J., 40 .. 61
Radha Madhab Samanta *v.* Sasti Ram, I. L. R., 26 Cal., 826 147
Radhamoni Chowdhrani *v.* James Gray, 12 W. R., 295 .. 15
Radha Shyam *v.* Joyram Senapati, I. L. R., 17 Cal., 896 .. 6
Radhika Nath Sircar *v.* Rakhalraj Gain, 10 C. L. J., 473 .. 130
Raghab Chandra Banerjee *v.* Brojo Nath Kundu, 14 W. R., 489 .. .. 83, 90, 96
Raghoonath *v.* Hurrish Chunder, W. R., Sp., 326 13
Raghuram Hazra *v.* Mohesh Chandra Bandopadhya, 7 C . W. N., 111 111
Rai Kishori Dassi *v.* Nilkanta De, 20 W. R., 270 .. 35
Raja Enayet Hossein *v.* Bibi Khoobunnessa, 9 W. R., 246 .. 31
Rajah Nilmoni Singh *v.* Messrs. Gordon Stuart & Co., 9 W. R., 371 33
Raja Nilmoni Singh *v.* Annoda Prosad, 1 B. L. R., 97 (F. B.), 10 W. R., 41 (F. B.) 32, 34
Raja Nilmoni Singh Deo *v.* Issur Chandra Ghosal, 9 W. R., 121 34
Raja Nilmoni Singh Deo *v.* Saroda Prosad Mukherjee, 18 W. R., 434 31

PAGE.

Raja Sattya Saran Ghosal *v.* Mohesh Chunder Mitter, 11 W. R., 10 (P. C.) 118, 122
Raj Chandra Roy Choudhury *v.* Annoda Prosad Mukherjee, 17 W. R., 221 70
Rajendra Nath Mukherjee *v.* Hira Lall Mukherjee, 14 C. W. N., 995 40
Rajkishore Mukherjee *v.* Dasruth Sootradhar, 15 W. R., 234 193
Raj Kumar Mozumdar *v.* Probhat Chandra Ganguli, 9 C. W. N., 656 51
Rajmohan Mitra *v.* Guru Charan Aich; 6 W. R., Act X, 106 26
Rajnarain Mitra *v.* Ananta Lall Mundul, I. L. R., 19 Cal., 703 .. .. 90, 94, 107, 145
Rajnarain Mitra *v.* Ekadasi Das, I. L. R., 27 Cal., 479 ; 4 C. W. N., 494 56
Rajnarain Mitter *v.* Panna Chand Singh, I. L. R., 30 Cal., 213 75
Rakhal Das Mukherjee *v.* Rani Surnomoyi, 6 W. R., 100 .. 22
Rakhal Moni Dassee *v.* Brojendro Gopal Roy, 23 W. R., 303 151
Rambux Chittangeo *v.* Madhoo Sudhan Pal Chowdhry, B. L. R., Sup. Vol., 675 ; 7 W. R., 377 135
Rambux Chulangea *v.* Hridoy Monee Debea, 10 W. R., 446 138, 182
Ram Chandra *v.* Belya, I. L. R., 22 Bom., 415 184
Ram Charan Bandopadhya *v.* Brindaban Rai, I. L. R., 19 Cal., 504 81
Ram Charan Bandopadhya *v.* Dropo Moyi Dassi, 17 W. R., 122 .. .. 127, 151
Ramcharan Sanyal *v.* Anukul Chandra Acharjya, I. L. R., 34 Cal., 65 ; 11 C. W. N., 160 ; 4 C. L. J., 578 9
Ram Churn *v.* Lucas, 16 W. R., 279 29
Rameshwar Malia *v.* Ram Nath Bhattacharjee, I. L. R., 33 Cal., 462 65
Ramgopal Aditya *v.* Rajan Sadagar, 6 C. L. J., 43 .. 183
Ram Jivan Bhadra *v.* Tazuddin Kazi, 15 C. W. N., 404 ; 3 C. C. L., 666 132
Ram Kinkar Biswas *v.* Akhil Chandra Chowdhry, 11 C. W. N., 350 118
Ram Kulp Bhattacharjee *v.* Tara Chand, 11 W. R., 358 .. 71
Ram Lall Sukul *v.* Bhela Gazi, I. L. R., 37 Cal., 709 .. 115
Ram Narain Chuckerbutty *v.* Pulin Behari Singh, 2 C. L. R., 5 32
Ram Narain Routh *v.* Lall Dass Routh, 6 C. L. J., 595 .. 129, 130
Ramnidhi *v.* Parbati Dassi, I. L. R., 5 Cal., 823 .. 27
Ram Saran Poddar *v.* Mahomed Latif, 3 C. W. N., 62 .. 67
Ram Sebak Bose *v.* Monmohini Dassi, L. R., 2 I. A., 71 ; 23 W. R., 113 .. .. 100, 101

PAGE.

Ramsona Chowdhurani *v.* Sonamala Chowdhurani, 13 C. L. J., 404 ; 3 C. C. L., 658 .. .. .. 106, 152, 155
Ram Sunkur *v.* Bejoy Govind, S. D. A., 1852, p. 824 .. 115
Ranee Sornomoyee *v.* Sutteesh Chandra Roy, 2 W. R., 13 (P. C.) 118, 119, 122
Rani Lalan Moni *v.* Sona Moni, 22 W. R., 34 57
Rani Shama Sundari Debi *v.* Jardine, Skinner, 3 B. L. R., App., 120 ; 12 W. R., 160 56
Rani Sornomoyee *v.* Shoshee Mukhee, 12 M. I. A., 244 ; 2 B.L. R., 11 (P. C.) ; 11 W. R., 5 (P. C.) .. 148, 149, 152
Ranjit Singh *v.* Kali Dasi Debi, I. L. R., 37 Cal., 57 .. 41, 43
Ranjit Singh *v.* Radha Charan Chandra, I. L. R., 34 Cal., 564 43
Rash Behary *v.* Peary Mohon, I. L. R., 4 Cal., 346 .. 156
Ratneshwar Biswas *v.* Harish Chandra Basu, I. L. R., 11 Cal., 221 .. .. 15, 16, 17
Rohini Kant Kar *v.* Tripura Sundari Dasi, 8 W. R., 45 .. 22
Roy Jotindro Nath Chaudhuri *v.* Prosunno Kumar Bannerjee, 15 C. W. N., 74 ; 3 C. C. L., 76 28
Rukhini Ballav Rái *v.* Jamania Begum, I. L. R., 9 Cal., 914 ; 12 C. L. R., 534 129
Run Bahadur *v.* Malloo Ram, 8 W. R., 149 45
Rutton Moni *v.* Kali Kishen, W. R., Sp., 147 186

S

Sachi Nandan Datta *v.* Maharaj Bejoy Chand Mahatab, Bahadur, 11 C. W. N., 729 95
Saibesh Chandra Sarkar *v.* Kumar Bonwari Mukund Deb Bahadur, 13 C. W. N., 299 *n* 79
Sakurulla Kazi *v.* Bama Sundari Dassi, I. L. R., 24 Cal., 404 51
Samboo Nath Shaha *v.* Bunwaree Lall Roy, 11 W. R., 102 .. 7
Sankar Nath Mukherjee *v.* Bejoy Gopal Mukherjee, 13 C. W. N., 201 6
Sankarpati *v.* Saifulla, 18 W. R., 507 181
Santiram *v.* Bykunt, 19 W. R., 280 45
Saroda Kumari Dassi *v.* Mohini Mohon Ghosh, 20 W. R., 272 136
Saroda Sundari Debya *v.* Tarini Charan Shaha, 3 W. R., S. C. C. Ref., 19 22
Saroda Sundari Debya *v.* Uma Charan Sarkar, 3 W. R., S. C. C. Ref., 17 21
Sarup Chandra Bhowmik *v.* Rajah Pertab Chunder Sing, 7 W. R., 219 ; 3 R. C. & C. R., 148 144
Satto Saran Ghosal *v.* Mohesh Chunder Mitter, 11 W. R., 11 (P. C.) 118, 122, 194

PAGE.

Satyendra Nath *v.* Nilkantha, I. L. R., 21 Cal., 383 .. 156
Saudagar Sirkar *v.* Krishna Chandra Nath, I. L. R., 26 Cal., 937; 3 C. W. N., 742 69
Saurendra Mohon Tagore *v.* Sornomoyi, I. L. R., 26 Cal., 103 .. 54
Sœfoollah Khan *v.* Luchmeeput Sing, 13 W. R., 58 .. 159
Shahaboodeen *v.* Fatteh Ali, 7 W. R., 200 (F. B.); B. L. R., Sup., Vol., 646 190
Shaik Abdulla *v.* Umed Ali, 6 W. R., 321 148
Shaik Naimuddin *v.* Girish Chundra Ghose, 5 C. W. N., 124 69
Shambhoo Nath *v.* Hara Sundari, 11 C. L. R., 140 .. 19
Sham Chand Kundu *v.* Brojonath Pal, 12 B. L. R., 484; 21 W. R., 94 184
Sham Chand Mitter *v.* Juggut Chunder Sircar, 22 W. R., 541 191
Shamjha *v.* Durga Rai, 7 W. R., 122 26
Sheik Niamat Ullah *v.* A. H. Forbes, 2 C. W. N., 459 .. 106
Sheik Enayet Ulla *v.* Sheik Elahee Buksh, W. R., Sp., Act X, 42 29
Sheo Prasad Sing *v.* Kali Das Sing, I. L. R., 5 Cal., 543 .. 50
Sheo Rutan *v.* Netlall Shaha, I. L. R., 30 Cal., 1; 6 C. W. N., 688 108
Sheriff *v.* Dina Nath Mukherjee, I. L. R., 12 Cal., 258 .. 153
Sheriff *v.* Jogemaya Dassi, I. L. R., 27 Cal., 535 .. 82
Shib Chandra *v.* Brojo Nath, 14 W. R., 30 25
Shib Dass Bannerjee *v.* Baman Dass Mukherjee, 15 W. R., 360 190
Shibessouree Debia *v.* Mothoora Nath Acharjo, 13 M. I. A., 270 10
Shoroshutti Dassee *v.* Parbutty Dassee, 6 C. L. R., 362 .. 27
Shristeedhur *v.* Pran Nath, S. D. A., 1858, p. 170 .. 119
Shunkerputtee *v.* Mirza Saifulla, 18 W. R., 507 177
Shyam Chand Jin *v.* Ram Kanai Ghose, I. L. R., 38 Cal., 526 (P. C.); 15 C. W. N., 417; 3 C. C. L., 431 10
Siba Kumari Debi *v.* Biprodas Pal Chowdhry, 12 C. W. N., 767 31
Sita Nath Basu *v.* Sham Chunder Mitra, 17 W. R., 418 .. 31
Smith *v.* Denonath, I. L. R., 12 Cal., 213 138
Sohodwa *v.* Maxwell Smith, 20 W. R., 139 178
Sona Bibi *v.* Lall Chand Chowdhry, 9 W. R., 242 101, 102, 103
Sooker Ali *v.* Umola Ahyalya, 8 W. R., 504 31
Soorendra Mohan *v.* Bhuggobut Chunder, 18 W. R., 322 .. 45
Soorjo Kumari Bibi *v.* Degumbari Dassi, 21 W. R., 219 .. 165
Sornomoyee *v.* Shoshee Mukhee, 11 M. I. A., 244; 2 B. L. R., 11 (P. C.); 11 W. R., 5 (P. C.) 148, 149, 152

PAGE.

Sornomoyee *v.* Sutteesh Chunder Roy, 2 W. R., 13 (P. C.) .. 118
Sornomoyi Dassya *v.* Land Mortgage Bank of India, Ld., I. L. R., 7 Cal., 173 163
Soshi Bhusan Bakshi *v.* Mahomed Matain, 4 C. L. J., 548 .. 45
Soshi Bhusan Guha *v.* Gogan Chundra Shaha, I. L. R., 22 Cal., 364 67
Soshi Kumar *v.* Sitanath, I, L. R., 35 Cal., 744 70
Sourendra Mohon Tagore *v.* Sornomoyi, I. L. R., 26 Cal., 103 : 3 C. W. N., 575 .. .. 68, 79
Sourindro Nath Pal Chowdhry *v.* Tincouri Dassi, I. L. R., 20 Cal., 247 .. .. 80, 86
Spooner *v.* Green, L. R., 9 Exch, 99 64
Sreemati Maharanee *v.* Harendra Lall, 1 C. W. N., 458 .. 156
Sreemunt *v.* Kookoor Chand, 15 W. R., 481 .. .. 118, 119
Sreemutty *v.* Govind, S. D. A., 1862, p. 260 110
Sreemutty Jogemaya *v.* Girendra Nath, 4 C. W. N., 590 .. 156
Sreenath *v.* Maharajah Mahtab Chand Bahadur, S. D. A., 1860, p. 325 .. .. 35, 36
Sreenath *v.* Ramdhon, S. D. A., 1859, p. 267 110
Sreenath Chuckerbutty *v.* Sreemanto Laskar, 10 W. R., 467 192
Sreenath Ghose *v.* Haronath Chowdhry, 18 W. R., 240 .. 194
Srinath Chandra Chowdhry *v.* Mohesh Chandra Bandopadhya, 1 C. L. R., 453 55
Sriram Chandra Chakravarti *v.* Hari Narain Singh .. 66
Sristidhar Shah *v.* Maharaja Jagundindar Bunwari Gobind, 2 Sev., 310 151
Sudhir Chunder *v.* Gour Chunder, 15 W. R., 99 184
Sultan Khan *v.* Radha Krishna Sing, 4 C. L. J., 520 .. 159
Surbo Lall *v.* J. M. Wilson, I. L. R., 32 Cal., 680 .. 69
Surendro *v.* Gopi Sundari, 9 C. W. N., 824 ; I. L. R., 32 Cal., 1031 .. .. 83, 86
Suresh Chandra Mukhopadhya *v.* Akkori Sing, I. L. R., 20 Cal., 746 151
Surja Kanta Acharj Chowdhry, *In re* I. L. R., 1 Cal., 383 .. 82
Surnomoyee *v.* Sutteesh Chandra Roy, 2 W. R., 13 (P. C.) .. 118
Surnomoyi *v.* Poresh Narain, I. L. R., 4 Cal., 576 .. 19
Surnomoyi Debya *v.* Girish Chandra Mozumdar, I. L. R., 18 Cal., 363 105
Syam Chand *v.* Jugut Chunder, 22 W. R., 50 12

T

Tahboonisso *v.* Kumar Sham Kishore Roy, 15 W. R., 228 .. 9
Tara Chand *v.* Nafar Ali, 1 C. W. N., 36 147

PAGE.

Tara Chand Biswas *v.* Ram Gobind Chowddhury, I. L. R., 4 Cal., 778 .. .. 13, 76
Taralall Singh *v.* Sorobar Sing, I. L. R., 27 Cal., 407 .. 186
Tara Pershad *v.* Ram Nursing, 6 B. L. R., App., 5 ; 14 W. R., 285 120
Tara Sundari Debya *v.* Shama Sundari Debya, 4 W. R., 58 .. 63, 77
Tarinee Debee *v.* Shama Charan Mitter, I. L. R., 8 Cal., 954 140
Tarini Charan Ganguli *v.* Watson & Co., 3 B. L. R., A .C., 437 ; 12 W. R., 413 52,53
Tarini Prosad Ghose *v.* Banee Madhub Pandey, 2 W. R., 248 150
Tarini Prosad Ghose *v.* Khoodoomoyee Debya, 13 W. R., 261 163
Tarini Prosad Ghose *v.* Raghub Chunder Banerjee, 13 W. R., 203 163
Tarini Prosad Roy *v.* Narayan Kumari Debi, I. L. R., 17 Cal., 301 .. .. 67, 68
Tekaet Bhao Narain *v.* Court of Wards, 15 W. R., 58 .. 186
Tekait Durga Prosad *v.* Tekait Durga Kumar, 20 W. R., 154 180
Thakurani *v.* Bisseswar, B. L. R., F. B., 326 180
Thakur Dass Roy *v.* Nobin Kishore Ghose, 15 W. R., 552 .. 114, 115
Tilak Chunder Kopalee *v.* Rajah Satyanund Ghosal, 22 W. R., 315 191
Tilotumma *v.* Brojonath, 8 W. R., 478 184
Tirthanund Thakoor *v.* Mutty Lall Misser, I. L. R., 3 Cal., 774 179
Titu Bibi *v.* Mohesh Chandra Bagchi, I. L. R., 9 Cal., 683 ; 12 C. L. R., 304 .. .. .. 118, 122, 190
Tituram Mukherjee *v.* Cohen, I. L. R., 33 Cal., 203 ; 1 C. L. J., 517 ; 2 C. L. J., 408 ; 9 C. W. N., 1073 63
Tripp *v.* Kali Dass Mukherjee, W. R., Sp., Act X, 122 .. 31
Tweedie *v.* Ram Narain, 9 W. R., 151 45

U

Uma Charan Banerjee *v.* Raj Lakhi, I. L. R., 25 Cal., 19 .. 57
Uma Nath *v.* Raghoonath, W. R., Sp., 10 ; 1 Hay, 75 ; Marsh., 43 115
Uma Sankar Sarcar *v.* Tarini Chandra Singh, I. L. R., 9 Cal., 571 30
Uma Sundari Debi *v.* Benode Lall Pakrash 61
Umatul Fatima *v.* Nemai Charan Banerjee, 6 C. L. J., 592 . 130
Umesh Chandra Bannerjee *v.* Khulna Loan Company, I. L. R., 34 Cal., 92 139
Unnopurna *v.* Oma Churn, 18 W. R., 65 .. .. 177, 180

PAGE.

Upendra Chandar Singha Roy *v.* Mahomed Faiz, 12 C. W. N., 670 61
Upendra Narain Bhattacharj *v.* Pratab Chunder Pradhan, 8 C. W. N., 320 ; I. L. R., 31 Cal., 703 42
Upendra Narain Ghose *v.* Bajpayee Rajah Keshub Chundra Deb, 6 W. R., 25 46

V

Vinayak *v.* Govind, I. L. R., 25 Bom., 129 6

W

Watson *v.* Srikrishna Bhaumik, I. L. R., 21 Cal., 132 .. 22
Watson & Co., *v.* Collector of Rajshahie, 12 W. R., 43 (P. C.) ; 2 P. C. R., 269 ; 3 B. L. R., 48 (P. C.) ; 13 M. I. A., 60 .. 53
Watson & Co. *v.* Dhanendro Chandra Mukherjee, I.L.R., 3 Cal., 6 153
Watson & Co. *v.* Nistarini Gupta, I. L. R., 10 Cal., 544 .. 30
Watson & Co. (Messrs. R.) *v.* Tarini Charan Ganguli, 17 W. R., 494 14
William Sheriff *v.* Jogemaya Dassi, I. L. R., 27 Cal., 535 .. 47
Williamson *v.* Wooton, 3 Drew, 210 64
Wooma Nath Roy Chowdhury *v.* Raghu Nath Mitter, 5 W. R., 63 122
Woomesh Chundra Gupta *v.* Rajnarain Roy, 8 W. R., 444 ; 10 W. R., 15 123
Woomesh Chandra Roy *v.* Esan Chandra Roy, S. D. A., 1859 p. 1198 107

Z

Zaheeruddin *v.* Campbell, 4. W. R., 57 27
Zohoorul Huq *v.* Guru Charan, 15 W. R., 329 185

THE

LAW OF REVENUE SALES.

PART I—THE PATNI SALE LAW.

(REG. VIII OF 1819.)

PASSED BY THE GOVERNOR-GENERAL IN COUNCIL ON THE 3RD SEPTEMBER, 1819.

A Regulation to declare the validity of certain tenures, and to define the relative rights of zamindars and patni talukdars, also to establish a process for the sale of such taluqs in satisfaction of the zamindar's demand of rent, and to explain and modify other parts of the system established for the collection of rents generally throughout Bengal.

PREAMBLE.

1. By the rules of the perpetual settlement, proprietors of estates paying revenue to Government, that is, the individuals answerable to Government for the revenue then assessed on the different mahals, were declared to be entitled to make any arrangements for the leasing of their lands in taluq or otherwise that they might deem most conducive to their interests. Preamble.

By the rules of Regulation XLIV, 1793,* however, all such arrangements were subjected to two limitations; *first*, that the jama or rent should not be fixed for a period exceeding ten years; and, *secondly*, that in case of a sale for Government arrears such leases or arrangements should stand cancelled from the day of sale.

* Bengal Regulation XLIV of 1793 has been repealed by Act XXIX of 1871.

The provisions of section 2, Regulation XLIV, 1793,* by which the period of all fixed engagements for rent was limited to ten years, have been rescinded by section 2, Regulation V, 1812; and in Regulation XVIII of the same year it is more distinctly declared that zamindars are at liberty to grant taluqs or other leases of their lands, fixing the rent in perpetuity at their discretion, subject, however, to the liability of being dissolved on sale of the grantor's estate for arrears of the Government revenue in the same manner as heretofore.

In practice, the grant of taluqs and other leases at a rent fixed in perpetuity had been common with the zamindars of Bengal for some time before the passing of the two Regulations last mentioned; but, notwithstanding the abrogation of the rule which declared such arrangements null and void, and the abandonment of all intention or desire to have it enforced as a security to the Government revenue in the manner originally contemplated, it was omitted to declare in the rules of Regulations V and XVIII of 1812, or in any other Regulations, whether tenures at the time in existence and held under covenants or engagements entered into by the parties in violation of the rule of section 2, Regulation XLIV, 1793,* should, if called in question, be deemed invalid and void as heretofore.

This point it has been deemed necessary to set at rest by a general declaration of the validity of any tenures that may be now in existence, notwithstanding that they may have been granted at a rent fixed in perpetuity, or for a longer term than ten years, while the rule fixing this limitation to the term of all such engagements, and declaring null and void any granted in contravention thereto, was in force.

Furthermore, in the exercise of the privilege thus conceded to zamindars under direct engagements with Government, there has been created a tenure which had its origin on the estates of the Raja of Burdwan, but has since been extended to other zamindaris; the character of which tenure is that it is a taluq created by the zamindar, to be held at a rent fixed in perpetuity by the lessee and his heirs for ever; the tenant is called upon to furnish collateral security for the rent, and for his conduct generally, or he is excused from this obligation at the zamindar's discretion; but even if the original tenant be excused, still, in case of sale for arrears, or other operation leading to the introduction of another tenant,

* Bengal Regulation XLIV of 1793 has been repealed by Act XXIX of 1871.

such new incumbent has always in practice been liable to be so called upon at the option of the zamindar.

By the terms also of the engagements interchanged it is amongst other stipulations provided that, in case of an arrear occurring, the tenure may be brought to sale by the zamindar, and, if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be further answerable for the demand.

These tenures have usually been denominated patni taluqs, and it has been a common practice of the holders of them to underlet on precisely similar terms to other persons, who on taking such leases went by the name of darpatni taluqdars: these again sometimes similarly underlet to sepatnidars; and the conditions of all the title-deeds vary in nothing material from the original engagements executed by the first holder.

In these engagements, however, it is not stipulated whether the sale thus reserved to himself by the grantor is for his own benefit, or for that of the tenant; that is, whether, in case the proceeds of sale should exceed the zamindar's demand of rent, the tenant would be entitled to such excess; neither is the manner of sale specified, nor do the usages of the country nor the Regulations of Government afford any distinct rules, by the application of which to the specific cases the defects above alluded to could be supplied, or the points of doubts and difficulty involved in the omission be brought to determination in a consistent and uniform manner.

The tenures in question have extended through several zillas of Bengal, and the mischiefs which have arisen from the want of a consistent rule of action for the guidance of the Courts of Civil judicature in regard to them have been productive of such confusion as to demand the interference of the Legislature. It has accordingly been deemed necessary to regulate and define the nature of the property given and acquired on the creation of a patni taluq as above described, also to declare the legality of the practice of underletting in the manner in which it has been exercised by patnidars and others, establishing at the same time such provisions as have appeared calculated to protect the underlessee from any collusion of his immediate superior with the zamindar or other for his ruin, as well as to secure the just rights of the zamindar on the sale of any tenure under the stipulations of the original engagements entered into with him.

It has further been deemed indispensable to fix the process by which the said tenures are to be brought to sale and the form and manner of conducting such sale;

and, whereas the estates of zamindars under engagements with Government are liable to be brought to sale at any time for an arrear in the revenue payable by monthly kists to Government, it has seemed just to allow any zamindar, who may have granted tenures with a stipulation of the right to sell for arrears, the opportunity of availing himself of this means of realizing his dues in the middle of the year, as well as at the close, instead of only at the end of the Bengal year, as heretofore allowed by the Regulations in force. It has further been deemed equitable to extend this rule to all cases in which the right of sale may have been reserved, even though, in conformity with the Regulations heretofore in force, the stipulation for sale contained in the engagements interchanged may have restricted such sale to the case of a demand of rent remaining unpaid at the close of the Bengal year.

The following rules have accordingly been enacted by His Excellency the Most Noble the Governor-General in Council, to take effect from the date of their promulgation throughout the several districts of the Province of Bengal, including Midnapore.

Notes.

Derivation.

Derivation of the word "Patni."—"The derivation of the word *Patni* is, according to Wilson, uncertain. Mr. Harington says it may be rendered 'settled or established,' which Professor Wilson pronounces very questionable. There is a word '*pattan*' which I have met in several districts used of settling with, letting to, a tenant, which is doubtless connected with Mr. Harington's explanation."—Field's Regulations, p. 37.

Origin of Patni Taluks.—At the Permanent Settlement, Government, by abdicating its position as the exclusive possessor of the soil and contenting itself with a permanent rent-charge on the land, escaped thenceforward the labour and risks attendant upon detailed mofussal management. The zamindars were not slow to follow the example set them and immediately began to dispose of their zamindaris in a similar manner, more especially as the system afforded them the only means of escape from the ruin threatened by the high assessment of land-revenue made at the time of the Permanent Settlement.

Origin.

The Patni taluks had their origin in the estates of the Maharajah of Burdwan. The land-revenue assessed on the estates settled with him was very high and, for easy and punctual realization of rent, permanent tenures known as Patni taluks, were created by him in large numbers, and extensive tracts were leased out on long terms in perpetuity and at fixed rent. These talukdars were thus made proprietors in the same way as the Government had made the Maharajah a proprietor. By the year 1819 permanent alienations of this kind had been so extensively effected in other zamindaris also,

especially in the districts of Hooghly, Burdwan, Bankura, Nuddea and Purnea, that they were formally legalised by Regulation VIII of that year, and means were afforded to the zamindars of recovering arrears of rent from their patnidars almost identical with those by which the demands of Government revenue were enforced against themselves.

Local Extent.

Local Extent—Regulation VIII of 1819 applies to the whole of the former Province of Bengal. It is in force in the district of Sylhet (see the Assam Land Revenue Manual, 1906, Introduction p. ix). The application of the Regulation is barred in the Chittagong Hill-tracts by the Chittagong Hill-tracts Regulation (I of 1900), and in the Lushai Hills by notification.

By the proprietor of a temporarily-settled estate.

Creation of Patni Tenures.—A patni taluk has been defined in the preamble as a taluk created by the zamindar to be held at a rent fixed in perpetuity by the lessee and his heirs for ever. Consequently, it cannot be created in a temporarily-settled estate. A Commissioner of the Division enquired as to whether a patni taluk, which is a permanent tenure, can be created in a temporarily-settled estate. The Board referred him to section 2, Regulation XVIII of 1812, which implies that a proprietor is not competent to enter into engagement with dependent talukdars for any period beyond the term of his own engagement with Government. The proprietor of a temporarily-settled estate may create a permanent tenure, because his own proprietary right is permanent, but he cannot create a permanent tenure at a fixed rent, because his own engagement with Government as regards the amount of his assessment is not a permanent one.—(Board's Miscellaneous Proceedings of the 13th August, 1881, No. 196, Collection 7, File 2883 of 1881).

Board's Proceedings.

By a Hindu widow.

A Hindu widow is not a tenant for life, but is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. She may, however, alienate it subject to certain conditions being complied with. (*Bejoy Gopal Mukerjee* v. *Krishna Mahishi Debi*, I. L. R., 34 Cal., P. C., 329). The test as to the validity of an alienation made by her is, whether the alienation can be shown to have been reasonably necessary for the due administration of the estate; whatever cannot be shewn to be necessary for that purpose cannot be considered incidental to a general power of management. (*Joymohun* v. *Edulji*, I. L. R., 22 Bom., 7). So in *Bissonath Chunder* v. *Radha Kista* (11 W. R., 554; 1 Hay, 339; Marshal, 113), it was *held* that a patni lease of certain lands, granted by a Hindu widow while in possession, is in no respect invalidated by the fact that her equity suit is pending at the time. If there is no legal necessity to justify the alienation, the patnidar acquires no more than the life-interest of the widow; but if there is, then a subsequent purchase is subject to the potta granted by the widow as a valid alienation of a prior date. In *Dayamani Debi* v. *Srinibash Kundu* (I. L. R., 33 Cal., 842), the High Court, following the principle laid down in *Hanooman Proshad Panday* v. *Mossamat Babooee Munraj Koonwaree* (6 M. I. A., 393), and *Kameshwar Pershad* v. *Run Bahadur Sing* (I. L. R., 6 Cal., 843), *held* that a Hindu widow, as regards the management of her husband's estate, has not less power than the manager of an infant's estate, and the reversioners are not entitled to set aside a permanent lease granted by her, which is found to be for the benefit of the estate and by which they are found to have benefited.

Valid when legal necessity exists or estate benefits.

Valid when reversioner consents.

Even where there is no legal necessity, a Hindu widow can make a valid alienation of either the whole of her interest or of a portion with the consent of the next male reversioner. In *Nobo Keshore* v. *Hari Nath* (I. L. R., 10 Cal., 1102), the Full Bench laid down broadly :—"Under the Hindu law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property." In the case of *Hem Chunder* v. *Surnomoyi* (I. L. R., 22 Cal., 354), it was expressly said :—"The widow may convey to the reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest." The case of *Vinayak* v. *Govind* (I. L. R., 25 Bom., 129), is another authority for holding that a Hindu widow may alienate portions of her husband's property with the consent of the next reversioners. The same view was taken in the case of *Sankar Nath Mukherjee* v. *Bejoy Gopal Mukherjee* (13 C. W. N., 201), where it was held that, apart from legal necessity, a Hindu widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. She can make such an alienation by the entire surrender of her own interest or part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity, the transferee would acquire an absolute interest. The fact that some of the parties interested accepted the arrangement subsequently to its being agreed on between the others would not affect its validity. Ordinarily, the consent of the whole body constituting the next reversioner should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. The consent of the reversioner is effective even when given after the execution of the deed of transfer (*Bajrangi Sing* v. *Monokarnika Baksh Sing*, 12 C. W. N., P. C., 74). See also *Radha Shyam* v. *Joyram Senapati* (I. L. R., 17 Cal., 896). An alienation of her husband's estate by a Hindu widow without legal necessity, but with the consent of the next reversioners who, if they had succeeded to the estate, would themselves have been entitled to the limited estate of a Hindu widow does not, however, pass an absolute estate to the transferee.—(*Bepin Behari Kundu* v. *Durga Charan Bandopadhya*, 12 C. W. N., 914.)

Grant by a widow not void but voidable.

It should be noticed that the grant of a patni by a Hindu widow is not void but voidable. A widow in possession of her widow's estate in a zamindari made a grant of a patni tenure under it to a lessee at a rent. A suit was brought by the reversionary heir on her death to have the grant set aside as invalid as against him. The patni lease was not proved to have been made with authority or from necessity justifying the alienation by the widow. *Held* that the patni was, on the death of the widow, only voidable and not of itself void, so that the plaintiff, the next inheritor of the zamindari, might then elect to treat it as valid (*Madhu Sudhan Sing* v. *E. G. Rooke*, I. L. R., 25 Cal., P. C., 1 ; L. R., I. A., 164 ; 1 C. W. N., 433). So also in *Hayes* v. *Horendro Narain* (I. L. R., 31 Cal., 698), it was decided, following the last case, that the creation of a patni taluk by a Hindu widow without legal necessity is not void, but only voidable, and may be validated by the consent

of the reversioner. In *Bejoy Gopal Mukerjee* v. *Krishna Mahishi Debi* (11 C. W. N., 424; I. L. R., 34 Cal., P. C., 329), again it was ruled, by their Lordships of the Privy Council, that an alienation by a Hindu widow is *primâ facie* voidable at the election of the reversionary heir. He may think fit to affirm it or he may at his pleasure treat it as a nullity without the intervention of any Court. The power reposed in the reversioner of validating an invalid alienation by a Hindu widow is, however, one which he is not competent to delegate to his executors.—(*Hayes* v. *Horendro Narain*, I. L. R., 31 Cal., 698.)

Acts which amount to an election to treat the lease as valid.

The question, therefore, arises, what would amount to an election to treat the lease as valid by the reversioner? In *Madhu Sudhan Sing* v. *E. G. Rooke* (I. L. R., 25 Cal., P. C., 1; L. R., I. A., 164; 1 C. W. N., 433), referred to above, the facts that the plaintiff had accepted rent in respect of the patni tenure, and that the tenure had been specified in a petition which accompanied the patnidar's deposit of rent in the Civil Court under s. 61 of the Bengal Tenancy Act (VIII of 1885) were held *primâ facie* to be an admission that the patni was still subsisting. In the absence of evidence to put a different construction upon the plaintiff's act and to negative its effect, there was, it was said in that case, a sufficient *primâ facie* case of an election to affirm the validity of the patni. In *Bejoy Gopal Mukerjee* v. *Krishna Mahishi Debi* (I. L. R., 34 Cal., 329), it was decided that, by instituting a suit for possession, a reversioner shows his election to treat the alienation as a nullity. The reversioner may affirm the alienation or treat it as void without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to his right of action—(*Ibid*).

By a proprietor's widowed mother.

It is doubtful whether a proprietor's widowed mother can grant a valid permanent lease. In *Bunwari Lall Roy* v. *Mohima Chunder Koonal and others* (13 W. R., 267), which was a suit for khas possession and for a declaration that a certain patni pottah was invalid, and where the plaintiff claimed, as the adopted son of the late proprietor's widow, to set aside a pottah which had been given by the late proprietor's mother, it was *held* that, though rents had been received, receipts given, and proceedings taken by both the adoptive mother and son as if there was a valid patni, the plaintiff was entitled to the declaration sought, the patni having been granted by a person who had no interest in the estate. In *Bonomali Roy* v. *Jagat Chandra Bhowmic* (I. L. R., 32 Cal., 669), however, the Judges of the High Court expressed an opinion that a lease granted by the proprietor's widowed mother in the course of the management of an estate is only voidable, and that, if it is granted for legal necessity, it is absolutely good and cannot be set aside. The case went up to the Privy Council, but their Lordships refused to express an opinion as to whether or not such a lease was in law binding. The law on the point is, therefore, still uncertain.

Limitation in case of an alienation by a Hindu widow.

In order to set aside a permanent lease granted by a Hindu widow, the reversioner must bring a suit within a certain time. The law under the older Acts was, and under the present Act still is, that the suit must be brought within twelve years from the date on which the cause of action arose. In *Samboo Nath Shaha* v. *Bunwaree Lall Roy* (11 W. R., 102), where a zamindar (*G*) died in 1240, leaving a widow, *B*, and his mother, *H*, the latter of whom created a patni pottah in 1241, under which *B* received the rents

from 1257 to 1273 from the principal defendant, and where the plaintiff, as the adopted son of *G* and the owner of the zamindari, sued the patnidar to set aside the patni, it was *held* that, if the creation of the patni was illegal, *B*, as the heiress of *G*, had an immediate right to sue to set it aside, and that if she did not and lost her right by lapse of time, the plaintiff's right of action must have accrued on his adoption in 1252; *held* also that, though mere receipt of rent under a void or voidable lease would not operate as a confirmation of it, or show that the lessee held possession of the land at the time, yet if, with full knowledge of the existence of the patni pottah, rents were claimed on behalf of the plaintiff and proceedings taken, under Regulation VIII of 1819, to enforce payments of the rents, as reserved on a patni tenure, by *B* at a time when she was acting as manager during the plaintiff's infancy from 1257, and the plaintiff on coming of age took no steps to repudiate the proceedings, Cl. 12, sec. 1, Act XIV of 1859 would apply to his suit. The same view was taken in the case of *Bonomali Roy* v. *Jagat Chandra Bhowmic* (I. L. R., 32 Cal., 669; 1 C. L. J., 319). In that case a patni lease of a portion of a zamindari was granted to the predecessors of the defendants by a proprietor's widow, *A*, who had at the time no estate in the property, but was acting as manager for *B*, the widow of her adopted son and the legal owner, and it was recited in the deed creating the tenure that the consideration-money was to pay the Government revenue then due. *B* in 1846, adopted a son, who was the father of the plaintiff. He attained his majority in 1856 and died in 1880. By ekrars made between her adopted son and *B*, she was allowed to remain in possession of the property in suit for life. *A* died in 1848 and *B* in 1894. The High Court held that a suit, brought in 1897, to set aside a patni lease was barred, and that it should have been instituted at the latest within 12 years of the date on which *B's* adopted son attained his majority. This decision was confirmed by the Privy Council and their Lordships observed: "If the patni was void, the period of limitation ran from the date on which it was granted under Regulation II of 1803, as amended by Regulation II of 1805, which was then in force. But if it was voidable only by Brajeshwari's (*B's*) successor, the right of action arose on the adoption of Bunwari Lall (*B's* adopted son), and time would begin to run against him from the date when he attained his marjority in 1856." Again, a Hindu widow granted a permanent lease of certain immovable property belonging to her husband's estate, and, after the alienation, adopted *K* in the year 1857, who died in 1862 after attaining majority, leaving his widow, *S*, who succeeded him. *S* died in 1899 and the plaintiffs, as reversionary heirs of *K*, instituted this suit for setting aside the alienation and establishing their right. *Held* that the cause of action accrued under s. 14, Regulation III of 1793 (which was then the law in force), in 1857, the date of the adoption of *K*, or in 1862 when *K* died major and that the suit being brought 12 years after that, it was barred.—(*Amrita Lall Bagchi* v. *Jatindro Nath Chowdhury*, I. L. R., 32 Cal., 165).

In *Bejoy Gopal Mukherjee* v. *Krishna Mahishi Debi* (I. L. R., 34 Cal., 329; 11 C. W. N., 424), which was a case under the present Limitation Act (XV of 1877), it has also been *held* that a suit by a reversioner on the death of a Hindu widow to recover immovable property of her husband, of which she was in possession for a widow's estate as his heir and of which she had

granted a lease for a term extending beyond her own life, is governed by the 12 years' period of limitation provided by Art. 141, Schedule II of the Limitation Act, and not by the 3 years' period prescribed by Art. 91. It is not necessary for the reversionary heir in such a suit to pray for a declaration that the lease is inoperative: It is for the lessee to plead and prove circumstances to show that the lease is not in fact voidable, but is binding on the reversionary heir: A suit by a reversioner during the life-time of the widow to have an alienation by her declared void except for her life is governed by Art. 125, Sch. II of the Limitation Act. A reversioner whose suit has been barred under this Article may, however, still sue for possession if he survives the widow.—(*Musst. Meeraw* v. *Girja Nundun Tewary*, 12 C. W. N., 857.)

By a Muhammadan widow.

The same principle, as in the case of Hindu widows, applies to alienations by Muhammadan widows. In *Mofazzul Hossein* v. *Basid Sheik* (I. L. R., 34 Cal., 36; 4 C. L. J., 485; 11 C. W. N., 71), it was *held* that although, according to the Muhammadan law, the mother of a minor is not the guardian of his property, yet, if she deals with the minor's estate, her acts, if they are for the benefit of the minor, should be upheld. So also in *Ramcharan Sanyal* v. *Anukul Chandra Acharjya* (I. L. R., 34 Cal., 65; 11 C. W. N., 160; 4 C. L. J., 578), it was decided that, when a Muhammadan widow, acting as the *defacto* guardian, purports to deal with the minor's property, the transaction, if it is for the benefit of the minor, ought to stand in the absence of fraud or any other element of that nature. See also *Hasan Ali* v. *Mehdi Hossein* (I. L. R., 1 All., 533), and *Majidan* v. *Ram Narain* (I. L. R., 26 All., 22).

By a shebait.

It was at one time doubtful whether the grant of a patni lease by a *shebait* was valid. In *Mati Dass and others* v. *Modhu Sudhan Chowdhury and others* (1 W. R., 4), the Judges remarked as follows:—"The question now before us is, whether the plaintiff is entitled to a decree for a specific performance of the contract alleged, which is that the defendant shall grant a patni lease of certain property. The property was bequeathed to the defendant by a will subject to certain religious trusts in favour of an idol, and the testator by his will prohibited any transfer of the property by sale or gift. The defendant, it is alleged, has contracted with the plaintiff to grant him a patni of the property, receiving by way of bonus Rs. 800. The grant of such an interest is an approach at least to an alienation permanently of a portion of the property. It is by no means clear to us that, either under the terms of the will in this case or by law, it is competent to the manager of an endowed property to grant a patni thereof. This doubt alone, without actually going the length of saying that such an interest cannot be lawfully given by such a person, is a sufficient ground for disposing of the present suit, because if there is any legal doubt whether the defendant can duly create an interest of this sort in an endowed property, we certainly ought not to enforce the contract for specific performance against him." It is, however, settled law now that such a grant is not necessarily void, provided that it is made on account of unavoidable necessity. In this respect the power of a mohunt or a *shebait* is similar to that of a manager of an infant heir's property. This is the view which has been taken in several cases. In *Tekhooniseo* v. *Kumar Sham Kishore Roy* (15 W. R., 228), it was *held*

that the grant of a patni tenure by a *shebait* might be valid and that, under the Hindu law, the *shebait*, or trustee manager of an endowment, was competent to alienate a reasonable portion of the property, if such alienation was absolutely required by the necessities of the management, *e.g.*, for the restoration of an image or for the repair of a temple. In *Doorga Nath Roy* v. *Ram Chandra Sen* (I. L. R., 2 Cal., 341 ; L. R., 4 I. A., 52) again a *mokurrari pottah* of *devattar* lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But in *Abhiram Goswami* v. *Shyama Charan Nandi* (I. L. R., 36 Cal., P. C., 1003), where a *mohunt* granted a permanent lease at a fixed rent without any legal necessity, it was *held* by their Lordships of the Privy Council that, on the most favourable construction, the grant could only enure for the life-time of the grantor and that it was not binding on his successors. The same view was taken in the case of *Nitya Gopal Sen* v. *Mani Chandra Chakrabutty* (12 C. W. N., 63), where it was *ruled* that a permanent lease of *debuttar* property is void if it is not executed for legal necessity. The general principle to be followed in considering the validity of such grants was laid down in the case of *Shibessouree Debia* v. *Mathoora Nath Acharjo* (13 Moo. I. A., 270, 275) where it was said that, apart from such unavoidable necessity, " to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the *mohunt* or *shebait*."

General principle to be followed in such cases.

Limitation in such cases.

The period of limitation in such grants is not governed by Art. 134 of Sch. II of the Limitation Act (XV of 1877), but by s. 10 of the Act (*Abhiram Goswami* v. *Shyama Charan Nandi*, I. L. R., 36 Cal., 1003 ; L. R., 36 I. A., 148). So also where a suit was brought by the Rajah of Pancha Kote, as the *shebait* of certain Hindu deities, to recover possession of *debuttar* property, which had been leased in patni more than 12 years before the institution of the suit by the plaintiff's predecessor in title, it was *held* (reversing the decision of the High Court) that the suit was not barred by limitation under Art. 134 of Sch. II of Act XV of 1877, the lessees not being the purchasers of an absolute title, and therefore not " purchasers " within the meaning of that Article (*Iswar Shyam Chand Jin* v. *Ram Kanai Ghose*, I. L. R., 38 Cal., P. C., 526 ; 15 C. W. N., 417 ; 3 C. C. L., 431).

By a mortgagor.

Where the rights and interests of a mortgagor were sold in execution of a decree declaring the mortgaged property liable for the mortgage-debt, it was *held* that a patnidar, who had obtained a *pottah* from the mortgagor subsequent to the mortgage and in violation of its conditions, had no right or title to hold possession against the purchaser. The purchaser in such a case buys the rights and interests of the judgment-debtor as they stood at the time of the hypothecation, and not as they stood at the time of the sale (*Brojo Kishori* v. *Mohammed Salim*, 10 W. R., 151). So also in *Jorra Gazi* v. *Aboo Khalifa* (21 W. R., 427), where certain mortgages were in existence at the time a patni was granted, it was *held* that the interest under the patni did not pass. A *patni* lease created in fraud of creditors but with the consent of the subsequent mortgagees is void. In *Jotindra Mohan Tagore* v. *Brojo Sundari Debee and others* (1 W. R., 262), Raja Bhoirub Indarnarain

died leaving a widow, Brojo Sundari Debee. By virtue of a will executed by her husband, the defendant was authorized to create *patni* tenures and to perform all other acts for the benefit of the estate, and on the 9th Ashar (22nd June 1857) she granted two patni leases—one of Mouza Pootia to Sree Nath Moitra, and the other of Mouza Baroiapra to another party. These *patnis* were granted in order to enable the defendant to pay off, from the bonus received, some of the more pressing of her husband's debts, who died heavily involved. The Raja's estates were mortgaged as security for the loans he had incurred; and ultimately the property was sold, with the consent of the mortgagees, by public auction by the master of the Supreme Court and purchased by the plaintiff. On taking possession of the property, the plaintiff discovered the newly-created patni which he sued to set aside on the ground that it had been fraudulently created by the Rani, subsequent to the mortgage in the name of her relatives. The *patni* leases were set aside and it was *held* that a *patni* may be set aside as invalid and made in fraud of creditors, notwithstanding the acquiescence of subsequent mortgagees.

By a lease including jote-jamas and patni taluks.

A settlement by a lease, which includes certain jote-jamas as well as certain patni taluks and reserves an aggregate rent for the whole without apportioning any portion to the jote-jamas as distinguished from the patni taluks, cannot properly be regarded as a patni tenure within the meaning of Regulation VIII of 1819.—(*Hayes* v. *Rudranund Thakur*, I. L. R., 33 Cal., 381.)

By a lease creating patnis in more estates than one.

An application for the sale of some taluks for arrears of rent was refused by the Collector as they were situated in more estates than one and therefore could not be regarded as patni taluks. The Commissioner, while upholding the Collector's order, remarked that the estates being the property of the same zamindar and the patnidars being by the condition of their kabulyats liable to sale for arrears, the Collector might under this Regulation have sold them up. *Held* by the Board, on appeal, that a tenure of this kind is not a patni tenure under the law, and the zamindar has consequently no right to ask for the enforcement of the provision of that law in respect of recovery of rents. It is quite clear that a patni taluk being the offspring of an estate cannot be more extensive than the estate itself. For each separate number of the tauzi of an estate, the zamindar must create a separate taluk, if the privileges which the law provides for sale, etc., are to be enjoyed. (Board's Miscellaneous Proceedings of 3rd August, 1889, No. 214, Collection 7, File 171 of 1889).

Board's Proceedings.

By a patnidar taking land not covered by kabulyat.

By permitting a patnidar to take a quantity of land in addition to what is already held by him in patni, and by recovering rents from him for such additional land for a series of years, a proprietor cannot, in the absence of any kabulyat from the patnidar or verbal agreement giving him the extra land in perpetual lease, be held debarred from resuming possession.—(*Kishore Bulluv Mitter* v. *Bistoo Chandra Ghose*, 12 W. R., 188.)

By a lease violating the rules against perpetuities.

Where a lessor, by a patni pottah leasing a mouzah, exempted from its operation certain lands and covenanted that, on certain contingencies happening, the lessee should acquire a right thereto as patnidar, but no time was specified within which the contingencies were to happen in order to vest the right in the patnidar, it was *held* that such a covenant was void as offending the rule against perpetuities even as between the parties to the cove-

nant.—(*Kumar Keshab Chandra Roy* v. *Brindaban Chandra Maitra*, 14 C. W. N., 601.)

By *Benami* trahsaction.

Where a suit was brought by the heirs of a deceased zamindar to set aside two patnis created by him *benami* in the name of his daughters, it was *held*—(1) that though the fund was advanced by the father, yet the advance must be presumed to have been by way of provision for the daughters, and that the patnis were created *bona fide* in favour of them ; (2) that, if this were not so, the title of a *bonâ-fide* purchaser for valuable consideration without notice of trust would be good against the heirs (2 Hay's Report, 630 ; Marshall's Reports, 564). Where a patni is sold and purchased in the name of another, the real purchaser can be sued for rent. In *Prosunno Coomar Pal Chowdhury and another* v. *Kailash Chunder Pal Chowdhry and others* (8 W. R., 428), Koylash Chunder Pal Chowdhury and others sued Gopal Chunder Mukerjee, Prosunno Coomar Pal and his wife in the Revenue Court for the rent due under a patni. The patni was sold for arrears of rent and purchased in the name of the defendant Gopal, and afterwards the zamindar treated Gopal as his tenant, and petitioned to sell the patni for the arrears of rent which became due after the sale, and which he alleged to be due from the defendant, Gopal Chunder. The rent was due, and the patni was sold. The plaintiff then sued Gopal Chunder, Prosunno Coomar and his wife jointly in the Collector's Court for subsequent arrears, alleging that the estate was purchased by Prosunno Coomar Pal and his wife in the name of Gopal Chunder, *benami* for them. *Held* by the Full Bench that the present suit was not barred by the proceeding under Regulation VIII of 1819, and the fact that the plaintiff (zamindar) had treated Gopal Chunder as the tenant when he was not aware of the whole circumstances of the case would not estop him from treating other persons as his tenants afterwards when he knew of those circumstances, if the facts showed that the other parties and not Gopal Chunder were the tenants.

Execution of Patni kabulyats.—The fact of a patnidar having made separate payments of rents, of having registered his name with each of the sharers and of being prepared to enter into a fresh engagement with one of them, does not amount to a cancellation of the original lease and the substitution of a new one (*Syam Chand* v. *Juggut Chunder*, 22 W. R., 50). A purchaser of a zamindari is not entitled to demand a fresh kabulyat from a patnidar. In *W. J. Beakwith* v. *Thakoor Dass Gossain* (1 W. R., 174), where the plaintiff purchased a zamindari at a sale in execution of a decree and brought a suit against the defendant, who was a patnidar within the zamindari, to obtain a kabulyat for the patni, it was *held* that neither under the provision of Act X of 1859, nor under any other law, was the plaintiff entitled to maintain such a suit. "If the patni tenure has been created, and is in existence," remarked the Judges, "the original patni pottah and kabulyat are sufficient to evidence the title of the patni, and do not require renewal upon the transfer either by sale or otherwise of the zamindari. If the plaintiff has lost, or has not obtained possession of, the original kabulyat from the zamindar, it may be that, upon proper allegation and evidence and possibly upon a sufficient indemnity being given, he is entitled to sue for the execution by the patnidar of a new kabulyat in the precise terms of the former one. But that is not the object of his present suit. He assumes that, merely as purchaser of the

zamindari, he is entitled of course to sue in the Collector's Court to obtain from the patnidar a fresh kabulyat. We think he is entitled to no such remedy." Where the proprietors of a mahal had agreed with an ijaradar that, in the event of their granting a patni to any body, he should have the refusal, and notwithstanding their agreement, gave a patni to another ijaradar, it was *held* that the latter, having been no party to the stipulation, was not bound thereby, and that the patni granted to him cannot be set aside (*Komol Lochon Dass* v. *Dwarka Nath Chowdhry*, 10 W. R., 254). This case was brought again to the notice of the High Court (*vide* 10 W. R., 414) on the ground that the defendant, at the time of taking the patni, had notice of the agreement existing between the plaintiff and the zamindar, and that, if he had such notice, he could not in equity maintain the lease which he obtained to the prejudice of the plaintiff. The Judges held that where *A*, taking a patni to the prejudice of *B*, has notice of an agreement existing between *B* and the zamindar, he cannot in equity maintain the lease which he has obtained, but *B* will be entitled to relief against him. Where *A* leased an estate in patni to *B* taking a bonus of Rs. 500 with the agreement that, if he wished at any time to hold the property *khas*, *B* should restore the property on receiving that sum back from *A*, it was *held* that *A* cannot sue to recover possession for the purpose of leasing it to a third party.—(*Raghoonath* v. *Hurrish Chunder*, Spl. W. R., 326; L. R., 102.)

Nature of a patni.—A patni lease is not an agricultural lease. "There is no authority," observed Maclean, C. J., in *Pramatha Nath Mitter and another* v. *Kali Prosunno Chowdhury and others* (I. L. R., 28 Cal., 745), "for such a proposition, and so to hold would, I think, come as a great surprise to the people of Bengal. A patni lease is generally granted to a middleman with a view to his subletting, which he generally does. It is not the patnidar, but his tenants who take land for agricultural purposes." What then is the nature of a patni? The question was discussed in the case of *Tara Chand Biswas and others* v. *Ram Govinda Chowdhury and others* (I. L. R., 4 Cal., 778). Jackson, J., who delivered the judgment of the Court, there observed:—"It seems to us that patnis, darpatnis and sepatnis, although they may not be in strict analogy with leases in England, lie somewhere between out-and-out sales and leases, and that at all events they contain in themselves sufficient of the nature of a lease to incline us to give the grantee or taker, in cases where it is otherwise equitable, that protection which a lessor in England is understood to guarantee his lessee for possession of the land. In the first section or preamble of Regulation VIII of 1819, patnis and the subordinate darpatnis and sepatnis are throughout spoken of as tenures and undertenures, and the instruments treating them are called leases. The fact that a consideration is commonly paid, does not seem to us to make the transaction as one of pure sale, because it arises from this generally that grantors are persons in need of money. Their needs vary with circumstances, and, according as their need for money is greater or smaller, the consideration is in proportion larger or smaller and the rent reserved is accordingly smaller or greater." There is, however, the relation of landlord and tenant between a zamindar and his patnidar. "It seems," said Jackson, J., in the same case referred to above, "to have been thought, not only by Mr. Justice Kemp, but also by Sir B. Peacock, that the rules

Not an agricultural lease.

Not an out-and-out sale.

The relation of landlord and tenant exists between zamindar and patnidar.

applicable in the relation of landlord and tenant in England would be applicable in this country, whenever no precise rule regulating the subject is to be drawn from the Hindu or other Common Law, and certainly, where those principles appear to be equitable, we should be inclined to apply them." In *Joykishna Mukopadhya* v. *Surjanessa* (I. L. R., 15 Cal., 345), again, Petheram, C. J., decided that the relation of landlord and tenant between the patnidar or his assignee and the zamindar subsists during the whole continuance of the tenure.

Definition of Rent.

Payment of Rent.—"Rent" has been defined in section 3, sub-section 5, of the Bengal Tenancy Act (VIII of 1885), as "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant."

Patni rent must be based on patni patta.

A zamindar and his patnidar being bound together by the terms of a written contract, the patni pottah, the former can realize rent only on the basis of that contract. In *Messrs. R. Watson & Co.* v. *Tarini Charan Ganguli* (17 W. R., 494), where the plaintiff and the defendants were bound together by the terms of a written contract, and the defendants contended that the plaintff could only sue for rent on the terms of that contract, and that, as he had not in this case sued to recover the patni rent on the basis of his kabulyat but had sued for rent due for the use and occupation of the land, the suit should be dismissed, it was *held* that this contention was correct. "The plaintiff," observed Justice Glover, "does not, I consider, sue for his patni rent, but for rent due for the use and occupation of the land, and the question is, can he bring such a suit? It is quite clear that up to the present moment there is a contract in writing between the parties to this suit on the subject of rent for the land held by the defendants, that is to say, the defendants hold a pottah and the plaintiff holds a kabulyat; and therefore the plaintiff can only bring a suit to recover rent on the basis of that kabulyat." So also in *Dhunendro Chundra Mukherjee* v. *Mr. John Watson Laidlay and others* (20 W. R., 400), it was *held* that a plaintiff is entitled to maintain a suit for rent where he bases his cause of action on the patni pottah held and admitted by the defendants.

Rent is payable to the landlord.

Rent presupposes the relation of landlord and tenant. It must be paid by the tenant to his landlord. The question sometimes arises as to whether the assignment of a portion of the rent to a third party is "rent." In *Jotindro Mohan Tagore* v. *Mosst. Kishen Moni Debee* (Spl. W. R., 11), the payment of revenue into the Collectorate by a patnidar in order to save the estate from sale, when the zamindar's payment (the zamindar had paid his own Government revenue also) was credited by the Collector not as revenue, but as a deposit and a receipt was granted to the zamindar accordingly, was *held* to be a sufficient payment of the patni rent to the zamindar. Jackson, J., remarked in this case:—"The Judge finds that the Collector made a mistake, and that the Collector should have credited the plaintiff's payment to the Government revenue, whereas he credited it to a deposit-account. In this state of facts, the plaintiff was himself in fault, because he should have seen that he obtained a proper receipt showing that his money was received as payment for revenue, whereas he took a receipt showing that the money was received as a deposit, not as a payment. The plaintiff now says he ought not to suffer for the Collector's alleged mistake.

This may be so, but it does not follow that the defendant should suffer." In *Radhamoni Chowdhrani* v. *Mr. James Gray* (12 W. R., 295), a patnidar's rent was payable in monthly instalments, he agreeing to pay the Government revenue out of the rent; it was arranged that, on presenting the Collector's receipts, such receipts should be considered as payments to the defendant. At the close of the year, the patni rent being in arrear, the defendant proceeded to bring the tenure to sale for arrear of rent under Regulation VIII of 1819. The plaintiff claimed to deduct the amount of the public revenue for the month of *Cheyt* which he had not paid, and which, under his kabulyat he was not bound to pay till the 13th of June, *i.e.*, 15 days before the last day allowed by the Government for that purpose. The defendant not having allowed the plaintiff to make the deduction, the plaintiff paid the whole amount to save his tenure from sale, and sued to recover back the amount so paid by him. *Held* that he was not entitled to deduct from an instalment of rent any portion of Government revenue which might not be payable until after the instalment was due, and that he was bound to pay either wholly in cash or partly in revenue receipts but, if he did not pay in one shape or the other, the instalment was due and there was an arrear of rent for which the defendant was entitled to sue. In *Mahabat Ali* v. *Mahamad Faizullah* (2 C. W. N., 455), again, where it was stipulated in a patni lease that the patnidar was to pay a certain sum of money as rent, but that, out of this, he was to pay, on behalf of the zamindar, two sums of money, one sum as cesses upon the property to the Collector and another sum as expenses for the maintenance of a *musjid* on the property to the party who had to conduct the expenses of the *musjid*, it was *held* that the two items of money were lawfully payable on account of the use and occupation of the land and were, therefore, rent. In *Ratneshwar Biswas* v. *Harish Chandra Basu* (I. L. R., 11 Cal., 221), however, it was decided that a sum of money payable by a tenant not to his immediate landlord but to a third person was not rent. In this case Ryasona Dasi gave an *ijara* to one Govindo Chandra Sirkar, and one of the conditions was that Govinda Chunder should pay a specified portion of the rent to the zamindar who was Ryasona's landlord. Govinda Chandra gave a *darijara* to Harish Chandra Bose subject to the conditions under which he himself held and then resigned the *ijara*. Ryasona confirmed the *darijara* to Hurish Chunder, who thereupon became her tenant, and she afterwards transferred her entire right in the land, as well as the right to receive the *darijara* rent, to Ratneshwar Biswas, who sued him for rent which had become due after the transfer and included in his claim that portion of the rent which Hurish Chunder ought to have paid to the zamindar. *Held* that Ratneshwar was entitled to recover the latter sum not as rent but as damages for breach of the contract. The conflict of decision between these cases was ultimately settled by a Full Bench in *Basanta Kumari Debya* v. *Ashutosh Chukravarti* (I. L. R. 27, Cal., 67; 4 C. W. N., 3), where it was decided that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent, and not for damages. The facts in this case were similar to those in the case of *Ratneshwar Biswas* v. *Hurish Chandra Bose* (I. L. R., 11 Cal., 221), and Mr. Justice Prinsep distinguished that case from the present

one as follows: "In the case of *Ratneshwar Biswas* v. *Hurish Chandra*, the plaintiff and defendant were not landlord and tenant. The defendant was the tenant of the plaintiff's tenant, and, in agreement with his landlord, he accepted the condition under which his landlord undertook to make payments of the rent to third parties, and this was accepted by the superior landlord, the assignee. The present case is between landlord and tenant, and the matter in dispute is the non-payment of the rent due by the latter to a third party. This was money due to the plaintiff as rent. In *Ratneshwar Biswas* v. *Hurish Chandra Bose* the money was payable by the defendant's landlord, and was payable under an assignment to a third party, who accepted the payment and sued on it. Here in my opinion lies the difference between the two cases." The other Judges, however, could not distinguish the two cases on the ground stated by Justice Prinsep and observed that they "saw nothing in the report of that case (*i.e.*, *Ratneshwar Biswas* v. *Hurish Chandra Bose*) to indicate that the assignment of the rent under the arrangement between the landlord and the tenant had been accepted by the assignee who was a third party, the zamindar, any more than it was accepted in the present case." In their opinion the fact that the assignee was not a party to the assignment and had not accepted it showed that, in the contemplation of the parties, the money did not cease to be a part of the rent or recoverable as such. So also in *Jnanada Sundari Chowdhurani* v. *Atul Chandra Chakravarti* (I. L. R., 32 Cal., 972), where a lease provided that a certain sum was payable by the tenant direct to the landlord as malikhana, and certain other sums were payable by the tenant for Government revenue and other demands which the landlord was bound himself to pay, it was *held* that the latter sums, though not actually payable to the landlord, were payable for the use and occupation of the land held by the tenant and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord, and as such they came within the definition of rent in s. 3 of the Bengal Tenancy Act. In later cases, however, such payments have been held not to be "rent." The grounds on which these cases have been distinguished are not quite intelligible, but a good deal depends upon the construction of the patni kabulyat in each case. In *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (I. L. R., 32, Cal. 169), *A* took a lease of certain mouzahs from *B* in darpatni and sepatni, and covenanted to pay annually Rs. 3,191 to the superior landlords of *B* direct and Rs. 1,800 to *B*. *A* was to take receipts from the superior landlords, make them over to *B* and take receipts from the latter. The whole amount of Rs. 4,991 was described in the lease as annual rent fixed and, in certain eventualities arising out of non-payment by *A* to the superior landlords, *B* was authorized to realize the amount from *A* by bringing a suit for arrears of rent. *Held*, upon a construction of the lease, that a suit brought by *B* for realization from *A* of the amount which the latter had failed to pay to the superior landlords under the terms of the lease, was, for the purpose of limitation, one not for rent, but for damages for breach of covenant. "It seems," observed Maclean, C. J. in this case, "reasonably clear, upon the language of the kabulyat, that all that the defendant covenanted to pay to the plaintiffs as rent was the Rs. 1,800 a year, and that, for reasons which, perhaps,

are fairly obvious, they declared to treat the rent due to the superior landlords as rent due from them to the plaintiffs, but entered into a separate and distinct covenant as regards that rent, *viz.*, to pay to the superior landlords direct. There is no covenant by the defendants to pay the total amount of Rs. 4,991 odd as rent to the plaintiff. There are two separate and disinct covenants, one to pay Rs. 3,191 odd to the superior landlords and the other to pay Rs. 1,800 as rent to the plaintiffs as landlords, and the contract was doubtless taken in this form for the benefit of the tenant : Great stress has been laid upon the words 'in all fixing the annual rent in your sixteen-annas share aforesaid at Rs. 4,991 odd,' &c. This, I think, only means that the total sum to be paid for the use and occupation of the land was to be Rs. 4,991 odd ; but this is subject to the later provision in the deed how the sum is to be dealt with.....Upon the best construction that I can put upon the deed, I do not think that the sum of Rs. 3,191 odd was rent payable by the defendants to the plaintiffs, and I think that the plaintiffs' proper remedy was, as has been done, to bring a suit for damages for the breach of the defendants' covenant.'' In this case it was observed that the case of *Ratneshwar Biswas* v. *Harish Chandra Bosu* (I. L. R., 11, Cal., 221), though referred to in the Full Bench case *Basanta Kumari Debya* v. *Ashutosh Chakravarti* (I. L. R., 27 Cal., 67 ; 4 C. W. N., 3), had not been over-ruled by that case. In *Jotindro Mohon Tagore* v. *Juruo Kumari* (I. L. R., 33 Cal., 140), the respondent held certain property under the appellant on patni tenure on terms which were embodied in two kabulyats executed by the respondent in 1885 and in 1893 respectively, in the former of which it was stated that '' the annual jumma of this patni mahal is fixed at Rs. 6,000.....Besides the said patni rent, I take upon myself the duty of depositing in the Collectorate the Government revenue of Rs. 40,156 fixed for the eight-anna share of the said mahals.'' The latter was to the effect that '' having agreed to pay an additional rent of Rs. 1,000 in respect of the patni which I took.....on the condition of paying you a patni *jumma* of Rs. 6,000 per year and of Rs. 40,156 into the Collectorate year by year and kist by kist as Government revenue for the said eight-anna share, I hereby promise.....that from the present year I shall pay the Rs. 1,000 in excess as *jumma* for my said *patni taluk.*'' Provision was also made in the *kabulyat* for payment by the respondent of certain cesses. On default in the payment of Rs. 7,000 rent and cesses, the amount with costs was to be recovered as arrears of rent under Regulation VIII of 1819 ; but for default in the payment of the Government revenue the penalty was declared to be forfeiture of the tenure. *Held* by their Lordships of the Privy Council (affirming the decision of the High Court) that, according to the true construction of the *kabulyats* read with Regulation VIII of 1819, the Government revenue was not '' money payable to the landlord '' and, therefore, was not '' rent '' within the meaning of s. 3, clause (5) of the Bengal Tenancy Act ; and consequently it could not be recovered by summary sale under the provisions of Regulation VIII of 1819. "The payment,'' it was observed by their Lordships, '' by the patnidar of the Government revenue is no doubt a part of the consideration to be rendered by her for the enjoyment of the tenure, but it is not money payable to the landlord. Nor is it provided in that document that it is to be dealt with in the same manner as rent, as is provided

in the case of cesses. And what is most significant of all, a special mode of enforcing the obligation to pay Government revenue is provided, *viz.*, the cancellation of the tenure in case of default; and this is the precise sanction which the law has forbidden by the terms of the Regulation in the case of rent" Maclean, C. J., distinguished this case from the Full Bench case of *Basanta Kumari Debi* v. *Ashutosh Chakraverti* (I. L. R., 27 Cal., 67) and observed: "We were told we are bound by the Full Bench case. That case affords us very little assistance in construing the document now before the Court. There the *whole sum* was rent, and, as Mr. Justice Macpherson put it, 'the money was undoubtedly a part of the entire sum which the defendant undertook to pay to the plaintiff, his landlord, as rent for the use of the land.' Here we have to ascertain whether the Rs 40,156 is or is not rent, which question must be answered in the negative." Where a former proprietor allowed the patnidar to pay his patni rent direct to the Collector, it was *held* that the present proprietor is not bound by that arrangement.—(*Modon Mohon Shaha* v. *Sookomoyee Chowdhrani*, Spl. W. R., Act X, 109.)

Abwabs.

The payment must be legal. Abwabs, or impositions on tenants over and above the actual rent, are not rent and cannot be recovered as such, for they are not lawfully payable under s. 74 of the Bengal Tenancy Act. This section is, however, controlled by s. 179 of the same Act, which provides that "nothing in this Act shall be deemed to prevent a proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent *mokurrari* lease on *any* terms agreed on between him and his tenant." In *Asanulla Khan Bahadur* v. *Tirthabasini* (I. L. R., 22 Cal., 680), the Court after holding that the *chowkidari* tax which the patnidar had contracted to pay the zamindar was not an abwab or illegal cess, observed: "In the above view of the case it becomes unnecessary to consider the effect of section 179 of the Bengal Tenancy Act, which enacts that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mokurrari lease on any terms agreed on between him and his tenant. There is, no doubt, some repugnancy between this section and section 74 of the Tenancy Act; but whether, following the principle enunciated by Lord Justice James in *Ebbs* v. *Boulnois*, we regard the latter, which is a special provision, as a qualification of the former, which is a general one, or, adopting the rule stated by Keating, J., in *Wood* v. *Riley* that of two repugnant clauses in a Statute the last must prevail, we give effect to the latter, there seems to be good reason for thinking that section 179 is not controlled by section 74." This view was followed in *Krishna Chandra Sen* v. *Sushila Sundari* (I. L. R., 26 Cal., 64; 3 C. W. N., 608), in which it was decided that a stipulation for the payment of an abwab in a permanent *mokurrari* lease is valid and that s. 74 does not control s. 179 of the Bengal Tenancy Act. The learned judges said in that case: "Though it is somewhat difficult to suppose that the framers of the Act can have intended to allow proprietors or permanent tenure-holders to stipulate for the payment of abwabs by their tenants, yet it may be that it was considered that an arrangement of this nature, so objectionable and liable to give rise to oppression in the case of ordinary raiyats, was fraught with less danger in the case of permanent *mokurrari* lease-holders.

Anyhow, the words of section 179, 'nothing in this Act,' are so wide that it seems impossible to resist the contention of the learned pleader for the appellant, and we are, therefore, constrained to give effect to it." The law at present, therefore, seems to be that a stipulation for the payment of an abwab in a patni or a darpatni lease is valid. Where, however, a permanent tenancy was created by a lease dated 1860, *i.e.*, before the passing of the Bengal Tenancy Act of 1885, the provisions of s. 179 do not apply and the landlord cannot recover any abwab from the tenant (*Aparna Charan Ghose* v. *Kooram Ali*, 4 C. L. J., 527; 10 C. W. N., 527). So also in a *mokurrari* lease executed long before the Bengal Tenancy Act of 1885 came into force, there was an agreement to pay a certain sum as rent, and an additional sum as zamindari *salami*, *holi* and other expenses, which were found to be arbitrary and extra charges imposed on the tenant on account of work done in the zamindari sherista and for other purposes, and it was *held* that the extra amount described as zamindari *salami*, &c., for expenses, is an illegal cess or abwab, and cannot be regarded as forming part of the rent fixed on the holding (*Bepin Behari Mitter* v. *Prokash Chandra Sarkar*, 13 C. L. J., 148; 3 C. C. L., 327). Observe that what is and is not an abwab must depend upon the circumstances of each particular case in which the question arises (*Padmanand* v. *Baijnath*, 1. L. R., 15 Cal., 828). Collection-charges, which a tenant agrees to pay, are not abwabs, and can be recovered, if they are certain and definite in their nature and form part of the consideration for the lease (*Mahamad Fyez* v. *Jamoo*, 1. L. R., 8 Cal., 730). Where in a patni kabulyat there was the following clause:—"According to the practice prevailing in the pergunnah we shall annually pay the collection-charges at the rate of 2 annas per rupee along with the instalments of the annual rent," Garth, C. J., observed:—"We believe that agreements of this kind are by no means unusual, and, if they are certain or definite in their nature and form part of the consideration for the lease, there is no reason why they should not be enforced" *Ibid.* In *Eastern Mortgage Agency Company* v. *Rai Ganpat Sing Bahadur* (9 C. W. N., 22, S. N.,) a thakurbari cess, which was fixed at the rate of one per cent. on the patni *jama*, was held not to be an abwab.

Road and Public Works Cesses.—Road and Public Works cesses, payable by talukdars, are recoverable under section 41, Cl. 2, of the Cess Act, Act IX (B. C.) of 1880. That clause provides:—"Every holder of a tenure shall yearly pay to the holder of the estate or tenure within which the land held by him is included, the entire amount of the road cess and public works cess, calculated on the annual value of the land comprised in his tenure at the rate or rates which may have been determined for such cesses respectively for the year as in this Act provided, less a deduction to be calculated at one-half of the said rates for every rupee of the rent payable by him for such tenure." There is, however, nothing in section 41 of the Cess Act of 1880 to prevent a zamindar from realizing the whole amount of the cess from the *patnidar* under a contract. (*Eastern Mortgage Agency Co.* v. *Rai Ganpat Sing Bahadur*, 9 C. W. N., 22, S. N.). The same view was taken in the case of *Mohanand Sahai* v. *Musst. Sayedunissa* (12 C. W. N., 154). See also *Sornomoyi* v. *Poresh Narain* (1. L. R., 4 Cal., 576); *Shambhoo Nath* v. *Hara Sundari* (11 C. L. R., 140); *Ashutosh Dhar* v. *Amir Molla* (3 C. L. J., 337) and

Payable by talukdar and zamindar.

But special contracts can be made.

Norendra Kumar Ghose v. *Goru Chand Joddar* (I. L. R., 33 Cal., 683; 3 C. L. J., 391).

Question to be considered in such contracts.

The question, which has to be considered in such cases, is the extent to which the parties have contracted themselves out of the provision of s. 41 of the Cess Act, because to that extent only will their rights and liabilities be governed by the contract, and, beyond that, the Statute must prevail. Accordingly, where in a perpetual *mokurrari* lease the rent was fixed by a clause which ran thus:—"At varying jamas, to wit, at an annual uniform *jama* of Rs. 1,580 from 1284 to 1291 (Fasli) and at an annual uniform consolidated jama of Rs. 1,585 of the current coin from 1292 (Fasli) together with *abwab* such as *salami* for *Dusserah* and Holi, Purkha, Sair, Road cess, Public Works cess, &c., all of which are included in that very sum of Rs. 1,585", it was *held* that the contract did not provide for the contingency which had happened in this case, namely, an increase in the amount of cesses levied by the State, and that, if any additional cess was imposed or if the amount of cess was increased, the incidence of the new burden must be regulated according to the Statute. (*Mohanand Sahai* v. *Musst. Sayedunessa*, 12 C. W. N., 154). Again, where a *maurasi mokurrari* lease contained a covenant that the lessee would pay, in addition to the fixed jama, Road and Public Works cesses at half-anna per rupee as was levied at the date of the execution of the lease, and that he would be bound according to the law to pay any other kind of cess or tax that Government might hereafter impose, it was *held* that the lessee undertook the liability to pay the cesses at half-anna per rupee according to the provisions of the Cess Act, and that consequently, in the event of revaluation, the increased cesses would be payable by him. The Judges said that, even if the lease bore the interpretation that the parties did not anticipate the contingency which had happened and did not make any provision for the same, it was clear that, according to the decision in the case of *Mohanand Sahai* v. *Musst. Sayedunissa*, the provisions of the Statute must be enforced (*Krishna Chandra Bose* v. *Mohendro Nath Bose*, 13 C. L. J., 212; 3 C. C. L., 410). Cesses are recoverable in the same way and under the same procedure and in similar instalments as rent, though they are not, strictly speaking, rent. They are not charges on the estate in the same way as rent, and a sale for arrears of cesses only does not have the same effect on incumbrances as a sale for arrears of rent.

Cesses recoverable as rent but they are not charges on the estate.

Chawkidari tax not an abwab.

Chaukidari Tax.—Chaukidari tax would not seem to come within the definition of "rent", but in *Ahsanullah Khan Bahadur* v. *Tirthabasini and others* (I L. R., 22 Cal., 680,) where in a suit for arrears of chaukidari tax payable to the zamindar by the patnidar under the patni settlement, the defence was that it was an illegal cess (*abwab*) and could not be legally recovered, it was *held* that, as the payment of the chaukidari tax was one of the terms of the patni settlement itself which was entered into between parties competent to contract and was made for valuable consideration, and, moreover, as the amount which the patnidar had agreed to pay as chaukidari tax was to be paid quite as much on account of the occupation of the property as that which was expressly called the rent and was part of the ground-rent quite as much as the latter, it was not an *abwab* and was, therefore, recoverable. *Held* also, upon the objection of the respondents that the suit being one of the nature cognizable by a Small Cause Court and valued at less than

Rs. 500, no second appeal would lie under s. 586 of the Civil Procedure Code, that, as the consideration for the payment of the chaukidari tax was the occupation or the holding of the patni tenure, and as the payment was to be made periodically to the zamindar by the patnidar, and the amount agreed to be paid was lawfully payable, it came within the definition of rent in the Bengal Tenancy Act, and that, therefore, a second appeal would lie. In distinguishing *Erskine* v. *Trilochan Chatterjee* (9 W. R., 518) where the contrary was held, the Judges observed :—"The contract in that case was one by which the patnidar undertook to pay the *dâk* charges, and that he not having done so, the zamindar had to undergo the expense and to sue for the money. If that be so, and if the contract was not to pay the amount to the zamindar in the first instance, the claim could not have been regarded as one for rent, and was rightly treated as one for compensation for the breach of contract."

What is *dâk* cess.

Zamindari dâk charges.—Dâk cess does not appear to be rent according to the definition of rent contained in the Bengal Tenancy Act, s. 3, sub-s. 5, since it is not paid for the use and occupation of land held by the tenant, nor is it an illegal cess. It is a cess levied by Government on zamindars in consideration of the conveyance by Government of the *dâk*. Tenants are not bound to pay it and the zamindar can only realize it from them if the latter agree to pay (s. 12, Act VIII, B. C. of 1862). In the case of *Bishonath Sircar* v. *Rani Sornomoyi* (4 W. R., 5), where the patnidar, on acquiring the *patni* in 1250, bound himself to pay the Government jama of Rs. 4,569 and also Rs. 200 as malikana to the zamindar, and where he engaged to obey and comply with all the laws of the Criminal, Revenue and other Courts enacted or to be enacted, the Judges remarked :—"We think Act VIII of 1862 was not intended to impose a new tax, but to consolidate and regulate an old liability. Primarily, the zamindars are in all cases liable to Government; but it was not designed to alter any right of reimbursing themselves from underholders which they might possess. In the case of raiyats, all liabilities are required by law to be consolidated and included in the pattah, and a liability beyond the stipulated rent could not be urged; but this does not seem to be so in regard to intermediate holders, and, at any rate, the general engagement to comply with the laws of the different Courts we take to be an acceptance of the criminal and other liabilities attached to the land. It would be no forced construction to include under these terms the liability to forward the *dâk* imposed by the old custom and law. If, then, the defendant was liable for the *dâk* service under the old law, we are of opinion that he is liable to pay to plaintiff the dâk charges under the new law." The case was remanded to find out whether in fact the plaintiff bore the *dâk* service charges under the old law. In other cases, however, it has been held that it depended on the terms of their leases whether patnidars were liable to pay the *dâk* charges or not. In *Saroda Sundari Debya* v. *Uma Charan Sarkar* (3 W. R., S. C. C. Ref., 17), the terms of the lease, made while section 10, Regulation XX of 1817, was in force between the parties, having clearly imposed on the patnidar the charge of the maintenance of the zamindari dâk, it was *held* that this liability was not affected by the subsequent repeal of the Regulation by Act VIII of 1862 (B. C.) So also in *Jillar Rahaman* v. *Bijoy Chand Mahtab* (I. L. R., 28 Cal., 293), where, in a

Payment depends upon contract.

patni kabulyat executed in 1855, the patnidar stipulated to pay the salary and the expenses of the *amlas* of dâk-chowki houses, and to appoint them and to superintend their work under the system of the zamindari *dâk* then in vogue, it was *held* that this stipulation imposed upon the patnidar the liability of paying the *dâk* charges recoverable from the zamindar, and that, although the system had since been changed, the liability of paying such charges must be taken to exist. But in *Saroda Sundari Debya* v. *Tarini Charan Shaha* (3 W. R., S. C. C. Ref., 19), the Judges remarked:—"The words of the kabulyat which we quote, *viz.*, 'I am responsible and liable for the costs of all orders with regard to these villages which may be at any time passed by the Civil, Criminal and Revenue Courts and authorities,' do not in our judgment make the patnidar liable to the present zamindari *dâk* assessment. It is doubtful if the terms used would, under the old law, have rendered the *patnidar* liable. We think that they are certainly insufficient to impose on him the tax which by the Act is now imposed on the zamindar." So also in *Rakhal Dass Mukerjee* v. *Rani Sornomoyi* (6 W. R., 100), where the plaintiff brought a suit to recover Rs. 514-0-5 (principal and interest), paid by him for *dâk* charges under Act VIII (B. C.) of 1862, and where the defendant, who was admittedly the patnidar, contended that he was not bound by the terms of his lease to pay the sum demanded, the words of the lease being "I am responsible for all orders that may be from time to time passed by the Civil, Criminal and Revenue authorities of the district respecting these villages, and for the expenses in carrying out these orders," it was *held* that the patnidar was not liable for a tax which was imposed on the zamindar by Act VIII (B. C.) of 1862. "The tax under Act VIII of 1862," observed the Judges, "was imposed by the Legislature and not by any local order of the zillah authorities; and the zamindar is liable. The terms of the lease in this case do not, in our judgment, make the lessee liable, and the words of the lease quoted above are certainly not sufficient to impose upon him the burthen of paying a tax, which is leviable from the zamindar. We cannot annex incidents to written contracts in matters with respect to which they are silent. In the case quoted by the Judge (*Bishonath Sircar* v. *Rani Sornomoyi*), the circumstances were not precisely the same. In that case, the suit was remanded to find whether the patnidar bore the *dâk* service charges under the old law, and whether, in that case, there appeared to have been a general engagement on the part of the patnidar to comply with all laws that might be passed." In *Rohini Kant Kar* v. *Tripura Sundari Dasi* (8 W. R., 45) also, it was *held* that, although the pottah contains a provision that, if any item is laid upon the zamindar over and above the suddar jama, the patnidar shall bear a rateable portion of it, this provision does not include the charges connected with the zamindari *dâk*, because the zamindari *dâk* is a matter unconnected with the suddar jama which a zamindar has to pay. See also *Maharaja of East Burdwan* v. *Shibnarain Roy* (4 R. C. and C. R., 247).

Is dâk cess leviable as rent.

Landlords can not recover or collect *dâk* cess as rent. In *Watson* v. *Srikrishna Bhaumik* (I. L. R., 21 Cal., 132), however, it was *held* that where *dâk* cess is claimed under the contract by which rent is payable, it must be regarded as rent, because it is claimed practically as part of the rent.

A case, in which a zamindar sues a patnidar for *dâk* expenses according to his patni jama, is a case of a nature cognizable by a Court of Small

Causes; and, as such, by section 27, Act XXIII of 1861, no special appeal will lie. (*Maharaja Dheraj Mahtab Chand Bahadur* v. *Radha Benode Chowdhury*, 8 W. R., 517). A suit by a zamindar against his patnidar for the recovery of money expended on account of zamindari *dák* charges, which the patnidar is bound by his contract to bear, is cognizable by Courts of Small Causes, and, consequently, no special appeal lies. (*H. S. Erskine* v. *Trilochan Chatterjee*, 9 W. R., 518.)

Suits for dák cess cognizable by Small Cause Courts.

Instalment.—It is contrary to the usage of the country for a *patnidar* to pay his rents by monthly *kists* without a special agreement for that purpose. —(*Joy Kishen Mukherjee* v. *Janki Nath Mukerjee*, 17 W. R., 47.)

Interest.—See notes under s. 4 (post).

Deposit of rent in Court.—Section 61 of the Bengal Tenancy Act applies to patni tenures.

That section provides: —

"(1) In any of the following cases, namely: -

(*a*) when a tenant tenders money on account of rent and the landlord refuses to receive it or refuses to grant a receipt for it:

Patnidar can deposit rent.

(*b*) when a tenant bound to pay money on account of rent has reason to believe, owing to a tender having been refused or a receipt withheld on a previous occasion, that the person to whom his rent is payable will not be willing to receive it and to grant him a receipt for it;

(*c*) when the rent is payable to co-sharers jointly, and the tenant is unable to obtain the joint receipt of the co-sharers for the money, and no person has been empowered to receive the rent on their behalf; or

(*d*) when the tenant entertains a *bond fide* doubt as to who is entitled to receive the rent,

the tenant may present to the Court, having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due."

There can be no doubt that, under Act VIII of 1869, a patnidar could deposit rent in Court. In *Thakur Dass Gossain* v. *Peary Mohun Mukerjee* (22 W. R., 431), it was *held* that a patnidar may deposit his rent in Court under s. 46, Act VIII of 1869, the term 'undertenant' in that section being wide enough to include *patnidars*. Act VIII of 1869 provided for only one case in which rent could be deposited in Court, *viz.*, when the tenant had tendered the rent to his landlord, and the landlord had refused it. This provision has been incorporated in s. 61 of Act VIII of 1885, and a patnidar can deposit rent in Court under the latter Act also.

Effect of withdrawal of deposit by Landlord.—In a suit decided by the Privy Council, in which a patnidar deposited two years' rent under this Act, and the rent was withdrawn by the landlord by a petition, stating that "my tenant had deposited Rs. 1,043 rent due to me," it was *held* that by such action the landlord must be regarded as having elected to recognise and confirm the patni tenure (*Modhu Sudhan Sing* v. *Rooke*, I. L. R., 25 Cal., 1; 1 C. W. N., 433; L. R., 24 I. A., 164). The mere deposit of rent in the Collector's office by the purchaser of an under-tenure in his own name and that of the registered tenant is not sufficient notice of such purchase to the zamindar, nor is the mere acceptance by the zamindar of rent so paid an acknowledgment on his part of the purchaser as his under-tenant; but it is

Effect of withdrawal.

otherwise when there is acceptance with notice, notwithstanding that the transfer has not been registered.—(*Mritanjai Sarkar* v. *Gopal Chandra Sarkar*, 2 B. L. R., A. C., 131 ; 10 W. R., 466.)

Remedy where excess exacted.

Remedy where excess rent is exacted by the zamindar.—Any sum, which is collected by a landlord in excess of the amount due to him under the agreement with his tenant, is an exaction, for the recovery of which a suit will lie under s. 75 of the Tenancy Act. It is not, however, an exaction when the excess is recovered by legal process. Where, for instance, a tenant supplied the zamindar with rice on the agreement that the value of the rice was to be deducted from the rent, and the zamindar, without making the deduction, sued the tenant under Regulation VIII of 1819, and recovered the full amount of the rent, it was *held* that this was not an exaction under this section. "The tenant," observed the Court, "might have contracted his liability to pay the amount, and might have demanded a summary investigation as to the amount due, and he might have stayed the sale of the tenure by depositing the amount claimed. Instead of doing so, he paid the amount claimed to the zamindar. The zamindar having recovered the amount under the proceeding prescribed by law, the question is whether that is an undue exaction. He possibly might have demanded more than was due after allowing for the rice supplied, but the defendant, instead of demanding an investigation, paid the amount claimed with knowledge of all the facts. Can this be said to be an illegal exaction of rent within section 10, Act X of 1859 ? We think that it is not an illegal exaction of rent within the meaning of that Act "—(*Chundermoni* v. *Debendra Nath*, Marsh., 420). Observe that a suit to recover a sum of money, alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road-cess and public works cess, is governed by Art. 96 of the second Schedule of the Limitation Act—(*Mathura Nath* v. *Steel*, I. L. R., 12, Cal., 533).

Enhancement and abatement of Rent.—There is no provision in Regulation VIII of 1819 for enhancement or abatement of rent. The provisions of s. 52 of the Bengal Tenancy Act will, therefore, apply to such cases, the object of s. 195 (*e*) of the latter Act being that the Bengal Tenancy Act should be held as supplementing the patni law (*Durga Prosad Bandapadhya* v. *Brindaban Roy*, I. L. R., 19 Cal., 504). Section 52 of the Bengal Tenancy Act says :—

52. (1) Every tenant shall—

(*a*) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made ; and

(*b*) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

52. (2). In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

(*a*) the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or holding;

(*b*) whether the tenant has been allowed to hold additional land, in consideration of an addition to his total rent or otherwise, with the knowledge and consent of the landlord;

(*c*) the length of time during which the tenancy has lasted without dispute as to rent of area; and

(*d*) the length of the measure used or in local use at the time of the origin of the tenancy, as compared with that used or in local use at the time of the institution of the suit.

52. (3). In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description and with similar advantages in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure; and shall not in any case fix any rent which, under the circumstances of the case, is unfair or inequitable.

52. (4). The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding.

52. (5). When in a suit under this section the landlord or tenant is unable to indicate any particular land as held in excess, the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area.

Leases with defined boundaries.

Enhancement of rent.—It very frequently happens that a lease, which conveys a certain number of bighas with certain defined boundaries, contains in reality a greater quantity of land than is specified; and the question whether this excess land is liable to assessment furnishes a constant source of litigation. It seems, however, to be tolerably settled by a number of recent decisions that, where the boundaries are given, the lease covers all the land included within those boundaries, whether in excess of the quantity specified or not. In such cases the lease is not to be construed as a lease of so many bighas and no more, but as a lease of certain lands, the number of bighas being added more by way of description than of limitation (*Janaki* v. *Nobin*, 2 W. R., Act X, 33). Where the *pottah* purported to convey one bigha of land, more or less, and within certain boundaries, it was *held* that the test of what was really conveyed was not the area of land, but the boundaries of that land. (*Shib Chandra* v. *Brojo Nath*, 14 W. R., 30.) A tenant was *held* to be entitled to hold the whole of the lands comprised within the *dags* endorsed on the *pottah* as included in, and appertaining to, his *mouraai* tenure, notwithstanding that measurements made subsequently showed that the area was larger than was formerly ascertained (*Modee Haddin* v. *Sandes*, 12 W. R., 439). Where, however, the land is undoubtedly included in the original tenure, but it was found on a fresh measurement that there was a mistake in the former

measurement, the tenant is bound to pay rent for the excess land (17 W. R., 33). See also *Puhlwan* v. *Moheshwar*, (18 W. R., P. C., 5).

Increase by encroachment.

A tenant may encroach upon the adjoining land of his landlord or he may do so on the neighbouring land of a third person. In the former case the law now is that the landlord may either treat him as a tenant in respect of the excess land or as a trespasser at his pleasure. (*David* v. *Ramdhon Chatterjee*, 6 W. R., Act X, 97; *Rajmohon Mitra* v. *Guru Charan Aich*, 6 W. R., Act X, 106; *Shamjha* v. *Durga Rai*, 7. W. R., 122; *Gulamali* v. *Gopal Lall Thakur*, 9 W. R., 65; *Ishan Chandra Mitra* v. *Ram Ranjan Chackravarti*, 2 C. L. J., 25). "We think," observed Markby, J., in *Gooroo Dass* v. *Issur Chunder* (22 W. R., 246), "the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law which is supported by reason and principle. In India, where there is a great deal of waste land, and where quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely, that if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful. We know of no case in which the principle has been expressly recognised by judicial decision in India, but it is in accordance with the principle laid down by s. 4 of Regulation XI of 1825 as the increase of land by alluvion. In practice also encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord. If it were so, the tenant would in twelve years necessarily gain an absolute title under the Statute of Limitations; but we do not know of any case in which a title has been thus established." In *Prahlad* v. *Kedar Nath Bose* (I. L. R., 25 Cal., 302), it was *held* that "when a tenant encroaches upon the land of his landlord, though the landlord may, if he chooses, treat him as a tenant in respect of the land encroached upon, the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land." But it does not follow that, if the landlord has exercised his option to treat him as a tenant for some time, he can turn round and treat him as a trespasser at any time (*Abdul Hamid* v. *Mohini Kanta Shaha*, 4 C. W. N., 508). In the latter case an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of, his landlord is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord, and this rule applies to all lands so encroached upon, whether the landlord has any interest in them or not. In such cases the landlord is entitled to additional rent for the lands so added (*Naddiar Chand Shaha* v. *Meajan*, I. L. R., 10 Cal., 820). And even if he has acquired a title against the third person by an adverse possession, he has acquired it for his landlord and not for himself. (*Ibid.*)

On landlord's land.

On third person's land.

Where land accretes to an under-tenure, the right of occupancy in the land passes to the owner of the under-tenure, and not to the zamindar. The general law upon the subject is contained in clause 1, section 4, Regulation

XI, 1825, which is as follows: "When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land be held immediately from Government by a zamindar, or as a subordinate tenure by any description of under-tenant whatever: provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed; and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. Nor, *if annexed to a subordinate tenure* held under a superior landholder, shall the under-tenant, whether a khudkasht raiyat holding a *mourasi istemrari* tenure at a fixed rate of rent per bigha, or any other description of under-tenant, *liable by his engagements or established usage*, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be jointly liable." Clause 1, s. 4 of Regulation XI of 1825, refers only to under-tenants intermediate between the zamindar and the raiyat, and to *khudkast* or other raiyats who possess some permanent interest in the land. (*Zaheeruddin* v. *Campbell*, 4 W. R., 57). The party to whose lands new formations gradually accrete is entitled to them, though he may not have lost any lands, and though the accretion may have been caused by the washing away of the lands of another person (*Adoomeah* v. *Shiboo Sundari*, 2 W. R., 295). As long as any portion of the estate is in existence, the zamindar is entitled to claim the land accreting to it as forming by law part of that estate.—(*Bhoobun Mohun* v. *Watson & Co.*, Sp., W. R., 64.)

Increase by accretion.

Reg. XI of 1825.

Where land has been added to the *jote* of a tenant by gradual accretion, the landlord is entitled to an increased rent on account of such accretion on the conditions laid down in Reg. XI of 1825 (*Shoroshutti Dasee* v. *Purbutty Dassee*, 6 C. L. R., 362). See also *Gopi Mohon* v. *Hill* (5 C. L. R., 33). A suit for enhanced rent will lie for the increase of the area of a *jote* after accretion (*Hara Sundari* v *Gopi Sundari*, 10 C. L. R., 559; *Brojendro Kumar* v. *Upendro Narain*, I. L. R., 8 Cal., 706; *Ramnidhi* v. *Parbati Dassi*, I. L. R., 5 Cal., 823). The accretion should be assessed at the same rate as the parent tenure (*Golam Ali* v. *Kalikrishna*, I. L. R., 7 Cal., 479; 8 C. L. R., 517). In this case, however, it was not laid down that there should be an inflexible rule applicable to all cases, but, having regard to the particular circumstances of that case, it was thought that the accreted land should bear the same rent as was payable in respect of the land included in the original tenure. (*Chooramonee* v. *Howrah Mills Company*, I. L. R., 11 Cal., 696.) Where a *mokurrari* is granted at the full letting value of the land comprised in it, it would be unjust to assess the newly-added land at the rate of the original *mokurrari*, if the accreted lands be of inferior quality; on the other hand, if the accreted lands be of superior quality, or, if in fixing the *mokurrari* rent, a lower standard than the full letting value was adopted in consideration of any bonus paid, it would be unjust to the landlord to fix the rent

Increased rent must be according to conditions laid down in Reg. XI.

Rate of assessment.

of the accretion at the rate of rent fixed in respect of the original tenure.—*Ibid.* But, in the absence of any special circumstance, the rate of rent to be assessed upon the accretion should be in proportion to that paid for the parent tenure.—*Ibid.* An increment is to be regarded as a part of the parent tenure, and the landlord cannot treat the increment as a separate tenure altogether and, treating it as a part and parcel of the parent tenure, he can claim such relief as under the law he is entitled to obtain as against the tenure-holder. (*Assanulla* v. *Mohini Mohan*, I. L. R., 26 Cal., 739).

Reformed site. If there has been a diluvion, and the tenant was paying on for the portion washed away, the reformation of that portion will not make him subject to enhancement. If, however, after the diluvion he has obtained a reduction of the rent, a reformation will again subject him to enhancement.—(Compare *Hem Nath Dutt* v. *Ashgur Sirdar*, I. L. R., 4 Cal., 894.)

Back-rent. There is nothing in the Bengal Tenancy Act to debar the landlord from claiming back-rents for any additional area, if such additional area was in the use and occupation of the tenant. (*Jugernath* v. *Jumman*, I. L. R., 29 Cal., 247; see also *Assanulla* v. *Mohini Mohan*, I. L. R., 26 Cal., 139). There is no provision in s. 52 or in any other section as is to be found in s. 154 which prescribes the time from which a decree for enhancement of rent is to operate.—*Ibid.*

Suit for enhancement of rent. A suit for enhancement of rent cannot be maintained by one joint landlord making the other joint landlords defendants in the suit (*Roy Jotindro Nath Chowdhuri* v. *Prosunno Kumar Banerjee*, 15 C. W. N., 74; 3 C. C. L., 76). Section 188 of the Bengal Tenancy Act requires that, where two or more persons are joint proprietors, they must all join in bringing a suit for additional rent for additional area (*Gopal Chunder* v. *Umesh Narain*, I. L. R., 17 Cal., 695).

Diluvion. *Abatement of rent.*—Before the passing of the Bengal Tenancy Act (VIII of 1885), a tenant was entitled to an abatement of rent on the ground of diluvion, unless precluded by the terms of his kabuliyat from claiming such abatement. In *Afsaroodeen* v. *Musst. Shorashi Bala* (Marsh., 588), a talukdar claimed an abatement of rent on the ground that a portion of his taluk had been washed away by a river; and the question arose whether he was entitled to claim a diminution of rent on this account. The Court held that he was so entitled, *unless there was an express stipulation that he should pay, whether the land was washed away or not.* "If a man," observed the Chief Justice, "stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented, and independently of section 18, Act X of 1859. We are of opinion that, according to the ordinary rules of law, if a talukdar agrees to pay a certain amount of rent, the tenant is exempt from the payment of the whole rent if the whole of the land be washed away. According to English law, a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent." This question was further discussed in a subsequent case, in which the tenant claimed an abatement upon the ground that part of his land had been washed away, and that a part of it had been covered with sand. "We think," observed the Chief Justice, "upon principles of natural justice and equity, that, if a landlord lets his land at a certain rent to be paid during the

period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy it, the tenant is entitled to an abatement. The first question then is, whether there was any stipulation in the kabulyat, which precluded the tenant from claiming an abatement, if, by an act of God any portion of his land was washed away? If it is found that, according to an express stipulation in the kabulyat, the tenant is not entitled to any abatement by reason of any part of the land being washed away by the act of God, then the tenant is not entitled to abatement during the term of that lease. But it is said the lease is at an end; but we think that, when a tenant holds on after the expiration of the lease, he does so on the terms of the lease at the same rent and on the same stipulations as are mentioned in the lease, until the parties come to a fresh settlement" (*Sheik Enayet Ulla* v. *Sheik Elahee Buksh*, Spl. W. R., Act X., 42: 2 Board's Rep., 62. *Quære.*—*Ram Churn* v. *Lucas*, 16 W. R., 279). Now, under section 179 of the Bengal Tenancy Act of 1885, there is nothing to prevent a proprietor, or a holder of a permanent tenure, in a permanently-settled area from granting a permanent *mokurrari* lease on any terms agreed on between him and his tenant. Thus in *Nanda Lall Mukerjee* v. *Kymuddin Sardar* (9 C. W. N., 886), where a tenant held under a permanent *mokurrari* lease which contained a clause to the effect that "the cultivation, non-cultivation, decrease, increase, diluviation or accretion, profits and loss of the same land are all at my risk," it was decided that he was not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river.

Land taken up by Government for public purposes.

A tenant is entitled to an abatement of rent not only when the area has been reduced by diluvion, but also owing to other causes. Thus, a *patnidar* claimed abatement of the *jama* of his patni on account of lands taken up for public purposes, as well as a refund of the rents paid in excess for a number of years. *Held* that a patnidar can sue for abatement under Act X of 1859 (*Prosonno Moyi Dassi* v. *Sundari Coomari Debya*, 2 W. R., Act X, 30). A patnidar may claim abatement upon the ground that the land is absolutely lost to him and he is also entitled to some share of the compensation-money (*Bhowani Charan Chuckerbutty* v. *Land Acquisition Deputy Collector of Bogra and another*, 7 C. W. N., 130). The same view was taken in the case of *Lala Jyoti Prokash Nandi* v *Jogendra Narain Roy* (11 C. W. N., 52*n*). In a suit for rent by a zamindar against a patnidar, the latter claimed an abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by Government for public purposes. The kabulyat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zamindar and the patnidar should divide and take in equal shares the compensation-money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by the *kabulyat*." *Held* that the *patnidar* was entitled to the abatement. In this case Field, J., in construing the clause in the stipulation, observed: "It appears to me that the taking of land by Government for a public purpose is not a cause of the same nature as diluvion, and for this reason: When land is washed away by

action of the river, the thing itself out of which the rent issues is destroyed, certainly for a time, although it is quite possible that by action of the same river there may be a reformation. But, in the case of reformation, the custom of the country is that, where an abatement has been allowed for diluvion, enhancement is claimable for alluvion. When land is taken up by Government, the thing itself out of which the rent issues is not destroyed; it continues to exist, and the Government pays what must be taken to be the market value of the land at the particular time. It therefore appears to me that it is impossible to say that the taking of land by Government for public purposes is a cause *ejusdum generis* (of the same kind) with diluvion." Norris, J., remarked: "In construing this document it can not reasonably be held that the taking of part of the land by the Government for the purposes of a railway is *ejusdum generis* with land abating or increasing by reason of diluvion and alluvion, or, in other words, by the act of God; and I am strengthened in coming to this conclusion when it is manifest that there was present before the minds of the parties, at the time the patni settlement was granted by the plaintiff, the fact that the Government was likely to take a portion of the land included in the settlement for the purposes of a railway; and if the parties intended that there should be no abatement of rent when Government exercises its powers, in addition to making an express provision for the distribution of the compensation-money, they would have further stated that there would be no abatement of rent" (*Uma Sankar Sircar* v. *Tarini Chandra Singh*, I. L. R., 9 Cal., 571). A kabulyat contained the following clause:—"In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight, of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion, &c." During the lease, a portion of these lands was taken up by Government for the purposes of a railway and compensation was paid to the lessor. The tenant claimed to make a deduction from his rent for the land taken away from him. *Held* that such a claim did not come under the meaning of the word "abatement" as used in the Rent Law, nor was it intended by the parties to be within the clause of the lease, but that the land having been taken from the whole area demised, not by natural causes, but by *vis major*, the ijaradar was entitled to a deduction from the rent on his showing that there were tenants of his on the land, who, before the land was taken by Government, paid rent to him which they had now ceased to pay (*Watson & Co.* v. *Nisurini Gupta*, I. L. R., 10 Cal., 544).

Resumption as chakeran.

A patnidar may claim abatement on the ground that portions of the land included in the patni have been resumed as *chakeran* by Government (*Haro Krishna Banerjee* v. *Joy Krishna Mukerjee*, 1 W. R., 299).

Dispossession through defect of lessor's title.

Where a tenant, after obtaining a lease for a certain quantity of land, was evicted from a portion of it owing to the defective title of his lessor, it was *held* that he was entitled to an abatement of rent. "When a landlord," observed the Court, "leases any portion of land without any further stipulation with regard to the title, he does thereby impliedly undertake that he has sufficient title to support the lease, and he guarantees the tenant quiet possession and enjoyment. This is the result of the law of England, and

we believe that it has always been held to be the same here." (*Brojonath Pal Chowdhury* v. *Hira Lall Pal*, 1 B. L. R., A. C., 87; 10 W. R., 120). If the tenant be evicted from the lands demised, or they be recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction, and if he is evicted from a part, the rent is to be diminished in proportion to the land from which he is evicted (*Gopinund Jha* v. *Lalla Govind Pershad*, 12 W. R., 109).

Abatement on the ground of misrepresentation of assets.

A patnidar sued his zamindar and obtained a decree for abatement of rent on the ground that the assets of the patni fell short of the amount stated in the lease. *Held* that the abatement was to take effect from the commencement of the *patni* lease (*Raja Nilmoni Singh Deo* v. *Sarola Prosad Mukherjee*, 18 W. R., 434). So also, where in a suit for rent a tenant, who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent for that portion, it was *held* that he was entitled to say so, and that it was not necessary for him to bring a separate suit for abatement (*Siba Kumari Debi* v. *Beprodass Pal Chowdhury*, 12 C. W. N., 767).

Miscellaneous.

A suit for abatement of rent by a patnidar on the ground of fraud, caused by the concealment from him of the existence of an intermediate tenure created by the zamindar, is maintainable under section 23, clause 3, of Act X of 1859. Section 18 of that Act is not applicable to such a case (*Sooker Ali* v. *Umola Ahyalya*, 8 W. R., 504). In a suit for arrears of rent from a patnidar where the plaintiff stated that he had, on an allegation made by the defendant that a dacoity had taken place in her house, allowed her an abatement, but, finding from a judgment of the High Court that no such dacoity had taken place, he claimed full rents, it was contended on his behalf that this grant of abatement of rent by him was a voluntary act on his part from which he could resile at any moment. The Judges, however, remarked that as "no notice of such intention to resile from the agreement was given to the defendant, we think that the argument can not be sustained even if the contention is correct law, upon which we give no opinion" (*Raja Enayet Hossein* v. *Bibi Khoobunnissa*, 9 W. R., 246).

Case in which a patnidar can not claim abatemnt.

If the tenant knew that the area of land leased to him was less than that mentioned in his pottah, it was *held* that he was not entitled to an abatement of rent on this ground (*Tripp* v. *Kali Dass Mukerjee*, Spl. W. R., Act X, 122). Nor would he be entitled to an abatement, if he came into possession of a less quantity of land through his own fault (*Sitanath Basu* v. *Sham Chunder Mitra*, 17 W. R., 418). In *Peary Mohon* v. *Aftab Chand* (10 C. L. R., 526), a portion of certain land held under a patni having been taken up by the Government for public purposes under the Land Acquisition Act, the zamindar declared his intention of granting no abatement of rent, and, acting upon this declaration, the patnidar was allowed to appropriate the whole of the compensation. The *patni* was subsequently sold under Reg. VIII of 1819, with notice of the amount of the original rent, and the purchaser now sued for abatement of that rent. He did not allege that he had no notice of the proceedings under the Land Acquisition Act—*Held* that the plaintiff must be presumed to have had notice of these proceedings, and that it was, therefore, incumbent upon him to have made enquiry regarding the position of the *patni*, and that, under the circumstances, he was not entitled to the abatement sought for.

Abatement how claimed.

Under the old tenancy law a tenant, who claimed an abatement of rent, had three courses open to him. He could either sue for a reduction of rent, or wait until sued by his landlord and then plead that he is entitled to a certain reduction (*Afsarooden* v. *Musst. Shoroshee Bala Debi*, Marsh., 558); or he might complain of an excessive demand of rent, and sue for a refund of the sum which had been exacted from him. When a raiyat had been compelled to pay an excess rent for 1265 of Rs. 99, for 1266 of Rs. 199, for 1267 of Rs. 195, for 1268 of Rs. 1,126, in all Rs. 1,617, and sued the zamindar to recover the excess, it was *held* that the suit was not barred by limitation under section 30, Act X of 1859. "No doubt," observed the Court, "when a diluvion took place, the plaintiff had a right of suit to obtain an abatement of his *jama*, if the zamindar had refused to grant such abatement. But he was not bound to sue for that purpose. He was not actually injured until compelled to pay the rent named in the *patta* without the allowance of the abatement he claimed. Upon that payment having been extorted from him, he had a new right of action, and as the suit would appear to have been brought within one year from that date, we think it was in time"—(*Barry* v. *Abdool Ali*, Spl. W. R., 64; 2 Board's Rep., 85; *Raja Nilmoni Singh* v. *Annoda Prosad*, 1 B. L. R., F. B., 97; 10 W. R., F. B., 41). Under the present law, section 52 (1) (*b*) of the Bengal Tenancy Act, it is not clear whether reduction of rent on account of a decrease in area can be claimed as a set-off or only in a suit brought for the purpose. The words "every tenant shall be *entitled*" in that section seem, however, to point to the conclusion that both these courses are open to him. As rent is a recurring cause of action, a tenant may set up a claim to abatement in a suit for the rent of any particular year, notwithstanding the fact that he has paid full rent for several previous years (*Mahtab Chand* v. *Chitro Kumari*, 16 W. R., 201). But where the defendants (darpatnidars), who were sued for arrears of rent by the plaintiffs (patnidars), alleged that a part of the land had been taken up by Government twenty-four years previously for the purposes of a railway, and claimed an abatement on that ground, it was *held* that, though the Limitation Act may not prevent a defendant from setting up such a defence, still the great delay in this case, combined with other circumstances, disentitled the defendants to any relief in a Court of Equity (*Ram Narain Chuckerbutty* v. *Pulin Behari Singh*, 2 C. L. R., 5).

Amount to be deducted how ascertained.

When once it is determined that a tenant is entitled to an abatement of rent in consequence of the subject of the demise having been diminished, whether by reason of its destruction as in the case of diluvion, or otherwise, the only thing that requires to be settled is, what was the amount, what was the portion of the original rent, which was referable to the portion of the tenure which has disappeared? Where there is nothing in the pottah to show that the rent was apportioned in parcels to the different parts of the whole land held in patni, the only way to arrive at a conclusion as to how much of the whole rent is attributable to this particular portion is to deal with it as a matter of proportion only; that is, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion as the annual value of the portion of the land which has disappeared bears to the annual value of the land originally leased (*Brojonath Pal Chowdhury* v. *Hira Lall Pal*, 1 B. L. R., A. C., 87; 10 W. R., 120.) The same prin-

ciple was laid down in *Lala Jyoti Prokash* v. *Jogendro Narain Roy* (11 C. W. N., 52*n*), and applied to a case, where it was found that the zamindars had taken the whole of the compensation-money, which was assessed at 20 times the annual rental of the portion of the patni acquired by Government under the Land Acquisition Act, and it was *held* that the *patnidar* was entitled to a remission of the amount which represented the annual rent (*Ibid*). This principle is in conformity with that laid down in cl. 4, s. 52 of the Bengal Tenancy Act.

Res judicata in cases of claims for reduction of rents.

The plaintiff obtained a patni lease of certain villages from the defendant in 1861 at an annual rent, and in 1865 was evicted from a portion of the property. She took no steps to obtain an abatement; but, inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent, the sum representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs. 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent abatement of her rent, she claimed the precise measure of abatement, *viz.*, Rs. 155, which she had claimed in the rent-suit brought against her by the defendant. *Held* that the question was *res judicata*, it having been raised and decided in the former suit and the question of abatement having been determined between the parties not only for the year of which the rent was in suit, but for all future years (*Nobo Durga Dasi* v. *Foyzbux Chowdhury*, I. L. R., 1 Cal., 202.).

Refund.

Refund.—Where a bonus is paid for a patni taluk not in existence, there is an entire failure of consideration, and the person paying the bonus is entitled to a refund of it. The principle *Caveat emptor* is not applicable to such a case (*Kisto Lall Moitro* v. *Nobo Koomar Roy*, 5 W. R., 232). In *Mukund Chunder Roy* v. *Pran Kishen Pal Chowdhury* (Spl. W. R., 287; L. R., 67), which was a suit to recover the consideration-money paid by the plaintiff for a *patni* lease which the plaintiff had been induced to take by the fraudulent representation of the defendants that khas possession would be given to him, it was *held* that the plaintiff's proper course was to repudiate the lease and to bring his action as soon as he found he could not get the kind of possession which he had paid for, instead of waiting for nearly five years: There having been great delay and partial possession having been obtained under the *patni* lease, the suit was dismissed. A zamindar (*A*) gave certain villages in *patni* to *B*, and received consideration-money and rent for them from him; but *B* never got possession of them, or derived any benefit from the *patni*, it having been found that the villages belonged to a third party as lakherajdar. The latter obtained a decree against *A* in a suit to which *B* was made a party. *Held* that the advertisement published by *A*, setting forth a description of the villages and calling upon intending purchasers to come forward, was substantially an implied warranty of title and would, in any case, make him responsible to the purchaser deceived by such misrepresentation. *Held* also that, in cases like this, it would be sufficient proof of fraud to show that the fact of ownership as represented was false, and that the person making the representation had knowledge of a fact

contrary to it. *Held* also that, fraud having been substantially alleged, the absence of a stipulation to refund did not protect *A* from refunding (*Rajah Nilmoni Singh* v. *Messrs. Gordon Stuart & Co.*, 9 W. R., 371). A claim for a refund of rent paid in excess must be brought in the Civil Court (*Prosunno Coomari Dassya* v. *Sundar Coomari Debya*, 2 W. R., Act X, 30). Where the plaintiff had, in a former suit to recover a part of the consideration-money and the excess rents paid by him on a *patni* settlement which the defendants had induced him to take on a false misrepresentation regarding the lots included in it, obtained consequential damages, it was *held* that he could not succeed in a second suit to get back the so-called excess of rent paid by him in terms of the *patni pottah* since the institution of the first suit. When once the cause of action was matured, the subsequent occurrance of further damage after or before the adjudication of the original matter does not originate a fresh cause of suit (*Raja Nilmoni Singh Deo* v. *Issur Chandra Ghoral*, 9 W. R., 121). This decision was, however, overruled in *Raja Nilmoni Singh Deo* v. *Annoda Prosad Mukerjee and others* (10 W. R., F. B., 41), in which it was *held* that where, in a former suit, the plaintiff, a *patnidar*, sued his zamindar for abatement of rent and for a refund of the consideration-money and rents paid by him for three years, a suit for a refund of rent for three subsequent years is not barred. The plaintiffs held a *patni* under the defendant sometime in the latter part of 1277 (1870). Government took up for public purposes 147 bighas of land out of the patni, but the defendant, in spite of that fact, continued realizing the full amount of the former *patni* rent till the end of 1280 (1873). In 1280 (1873) the plaintiffs brought a suit for an abatement of rent on the ground of diminution of the area by the act of Government and got a decree, reducing the rent proportionately. The plaintiffs then brought this suit for a refund of the rent paid by them in respect of this 147 bighas for the last half of 1277, and for the years 1278 to 1280, being the period during which they had paid for, but had not enjoyed, that portion of the *patni*. *Held* that the plaintiffs may sue for a refund of the rent paid by them, before instituting the suit for abatement of rent, in excess of the amount justly payable, notwithstanding that they might have, if they had chosen, included this claim in their suit for abatement of rent (*Akhoy Kumar Chattopadhaya & others* v. *Mahatap Chand Bahadur*, I. L. R., 5 Cal., 24).

Patnidar entitled to compensation.

Patni land taken up for public purposes.—A patnidar is entitled to compensation for land taken for public purposes, although there is no agreement to that effect (*Joy Kishen Mukherjee* v. *Reazoonussa Begum*, 4 W. R., 40). Where a portion of a *patni* is acquired by Government under the Land Acquisition Act, the *patnidar* is entitled to an abatement of rent, as the land taken up by Government is absolutely lost to him, and he is also entitled to some share of the compensation-money (*Bhabani Nath Chukerbutty* v. *Land Acquisition Deputy Collector of Bogra and Maharajah Jotendra Mohan Tagure*, 7 C. W. N., 130).

Apportionment of compensation.

The total compensation awarded for the lands taken up under the Land Acquisition Act proceedings should be distributed amongst the various persons interested in the property, in proportion to their respective interests. The only difficulty in practice is how to value the interest of each person concerned. In considering the principle on which the amount of compen-

sation should be divided, it should always be remembered that the zamindar is an annuitant and the *patnidar* the real proprietor of the land. "The security for the annual payment," observes Mr. Justice Mitter in his work, The Land Law of Bengal, pp. 203-204, "is all that the annuitant may fairly claim, if no abatement is allowed. If, however, abatement is allowed, he is entitled to the capitalized value of the amount of his annual loss. It is difficult to see how he can get anything more, having parted with his proprietory right reserving only an annual sum." The same principle was enunciated in the case of *Kanai Lall Khan* v. *Midnapur Zamindari Co.* (5 C. L. J., 48*n*.) "So far," it was observed, "as the zamindar is concerned his interest is limited in perpetuity. That interest is to receive a certain amount of rent from the *patnidar*. So far as the *patnidar* is concerned, he has the rest of the interest in the land vested in him. The value of the interest of the zamindar is to be determined by capitalizing what he has lost. This is to be calculated by ascertaining the rent payable to him and deducting from it the Government revenue payable. This represents his net profit which he has lost by reason of the acquisition."

The authorities on the subject are, however, conflicting. In one of the oldest cases, *Sreenath* v. *Maharajah Mahtab Chand Bahadur* (S. D. A. 1860, p. 325), the Sudder Dewani Adawlut said:—"The zamindar and the *patnidar* are entitled to compensation in proportion to the losses they respectively sustain from the appropriation of their lands and to the remission of the rents which they pay respectively to the Government or the zamindar. In respect to remission, as the gross rental of the whole *patni* is to the gross rent of the land proposed to be taken, so will the entire *patni* rent be to the particular portion of the rent to be remitted; and, with regard to compensation, the principle may most conveniently be stated as follows:—As the gross profit of the *patni* is to the profit of the *patnidar*, so will the gross compensation be to the portion of the compensation the *patnidar* is entitled to recover." In the case of *Maharajah Mahtab Chand Bahadur* v. *The Bengal Coal Company* (10 W. R., 391), however, it was *held* that the principle, laid down in the above case by the Sudder Court to regulate the compensation for land taken for public purposes, is not applicable to the division of compensation in every case. It would not provide for the case of several *patnis* where the land is taken from the holder of the last tenure, and where the grantors of the several intermediate tenures have received a sum of money as a bonus for the grant. In *Rai Kishori Dassi* v. *Nilkanta De* (20 W. R., 370), where land held in *patni* was taken by Government for public purposes, it was laid down that the proper mode of settling the rights of the parties interested was to give the *patnidar* an abatement of his rent in proportion to the quantity of land which had been taken from him, and to compensate the zamindar for the loss of rent which he had sustained. "The zamindar," observed Couch, C. J., "has a right to the fixed rent, and the loss which he sustains is of so much of his rent. Any other possible injury, such as the chance of the *patnidar* throwing up the land and its being diminished in value by what has been taken by Government, and still remaining, as it did, liable to pay the same revenue is, we think, not appreciable, and cannot be taken into account. If there is no abatement of the rent, and the *patnidar* continues liable to pay to the zamindar the same rent as he had to pay before

there would be nothing for which the zamindar ought to receive compensation. But the proper mode of settling the rights of the parties is to give to the *patnidar* an abatement of his rent in proporton to the quantity of land which has been taken from him.....That being so, the zamindar ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The *patnidar's* getting an abatement of his rent is to be taken into account, as partly the way in which he is compensated for the loss of the land." Accordingly, the compensation awarded was held to have been very fairly distributed, where the zamindar received a little more than 16 years' purchase of the rent abated and the patnidar received the remainder. So also in *Kumar Dinendra* v. *Tituram* (I. L. R., 30 Cal., 801 ; 7 C. W. N., 810), it was *held* that, in apportioning compensation under the Land Acquisition Act between a zamindar and a tenure-holder under him, the Court ought to proceed on the principle of ascertaining what the real interest of each party is in the property and what is the interest each party parts with. Where the lease is permanent and at a fixed rent, the chances of the lease coming to an end or being forfeited being scarcely appreciable by a money-payment, the interest of the landlord cannot be put higher than the fixed rent he receives and for this he is entitled to be compensated at so many years' purchase. The tenure-holder, who is the real beneficial owner in such a lease, is entitled to the whole of the remaining portion of the compensation-money. The principle laid down in these cases is in accordance with the rule laid down by the Sudder Dewani Adawlut in *Sreenath* v. *Maharaja Mahtab Chand Bahadur* referred to above, but the High Court has not always adhered to it. In *Godadhur Dass* v. *Dhunpat Singh* (I. L. R., 7 Cal., 565), it was *held* that, where a *patni* and a *darpatni* have been given of a piece of land which is afterwards acquired by the Government for public purposes under the provisions of the Land Acquisition Act, the zamindar is, generally speaking, entitled to as much of the compensation-money as the *patnidar* is. As a rule, raiyats having a right of occupancy in such land, and the holders of the permanent interest next above the occupancy-raiyats, are the persons entitled to a large portion of the compensation-money. Garth, C. J., laid down in this case the principle on which compensation-money should be apportioned among the different holders as follows :—" As regards the zamindar, it is a mistake to suppose that his interest in the land is confined entirely to the rent which he receives from the *patnidar*. He is the owner of it under the Government, and in the event of the *patni* coming to an end by sale, forfeiture, or otherwise, the property would revert to the zamindar, who might deal with it as he pleased in its improved state ; and although in some cases, and possibly in this, the chances of the *patni* coming to an end may be more or less remote, there is no doubt that, in all cases, the zamindar is entitled to some compensation (small though it be) for the loss of his rights. At any rate, he would generally be entitled to receive as much as the *patnidar*, to whom in this instance the whole compensation has been awarded by the District Judge. If the latter continues to pay and receive the same rent which he did before, or if, on the other hand, he both makes an abatement to the *darpatnidar* and obtains an abatement from the zamindar, as a rule he is no sufferer ; because generally speaking, the difference between the amount of rent, which he

pays and the rent which he receives, represents the improved value of the land which he gets from the *darpatnidar*. It may be, of course, that his *patni* interest would sell in the market for a price larger than the capitalized value of the rent which he receives from the *darpatnidar*, and if so, he would be entitled to be compensated for the loss of the difference out of the sum payable by the Government. But, as a rule, the capitalized value of the *darpatni*, over and above the value of his own outgoings, would represent the market-value of his *patni* interest. The parties, who usually suffer most from lands being taken for Government purposes, are either the raiyats with right of occupancy, or the holders, whoever they may be, of the first permanent interest above the occupying raiyats. The actual occupier is of course turned out by the Government and, if he is a raiyat with a right of occupancy, he loses the benefit of that right, besides being driven possibly to find a holding and a home elsewhere, and the holder of the tenure immediately superior to the occupying raiyats, whatever the nature of his holding may be, loses the rent of the land taken during the period of his holding. These two classes, therefore, would, generally speaking, be entitled to the larger portion of the compensation, and, if the *darpatnidar* in this instance belongs to the latter class, the larger portion of the compensation ought, presumably, to have gone to him." So also in *Bunwari Lall Choudhry and others* v. *Barnomoyi Dasi* (I. L. R., 14 Cal., 749), where the Government took up 2 *bighas* 2½ *cottahs* of land for the purposes of a Railway in the sub-division of Goalundo in Fureedpore and the zamindar claimed half the amount of the compensation, but the *patnidar* claimed the whole amount on the ground, among others, that there was no condition in the *patni pottah* that they should get an abatement in the *jama* from the zamindar in the event of any land being taken up by the Government, and the District Judge, upon the general principle laid down in *Gadadhur Dass* v. *Dhunput Sing* (I. L. R., 7 Cal., 585), ordered and decreed that the compensation should be divided equally between the zamindar and the *patnidars*, the High Court, while accepting the authority quoted by the District Judge, observed:—"It seems to us that no general principle can be laid down applicable to every case between the zamindar and the *patnidar*. In the present case we must take it that the *patnidar* is the person to whom the raiyats directly paid their rent. The apportionment between the zamindar and the *patnidar* will depend partly on the sum paid as bonus for the *patni* and the relation that it bore to the probable value of the property, and partly on the amount of rent payable to the zamindar and also on the actual proceeds from the cultivating tenants or under-tenants. It may occasionally happen that the zamindar receives an extremely high bonus and is content with charging the property with the receipt of a very low rate of rent, or it may be that the bonus is almost nominal and the rent is excessively high, and the zamindar depends not on the bonus and the interest of the amount so paid and invested in some other way, but on the amount paid periodically as rent, and, consequently, as between parties standing in these relations, it is necessary to consider all these matters before any conclusion can be arrived at as to their rights to any particular compensation." Where, again, some land was acquired by Government under the Land Acquisition Act and the *patnidar*, who was precluded, under the terms of the *patni pottah*, from claiming any abate-

ment and continued to pay the same rent, it was *held* that, as the zamindar lost nothing, and that, as the pecuniary values of the chance of the *patni* lease coming to an end by sale or forfeiture was difficult to appreciate, the property was really the property of the *patnidar*, being held upon a permanent lease at a fixed rent not liable to enhancement, and that the *patnidar* was entitled in the circumstances to the whole of the compensation-money (*Bipro Duss Pal Chowdhry* v. *Kumar Sonat Chandra Singh*, 11 C. W. N., 161*n*).

Patni land taken up by private parties and not by, or through, Government.

Where some land was taken by a railway company (not through the instrumentality of Government whereby the land was taken away altogether from the *patnidar* and the superior landlord, and the assets of the zamindari reduced in consequence) from a *patnidar*, and the *patnidar* received from the railway company compensation for the loss suffered by him in consequence of the erection of the company's works there, it was *held* that this was a matter between the *patnidar* and the company with which the zamindar, who continued to receive his rents in full, had no concern. He was not, therefore, entitled to participate in the compensation received by the *patnidar*. To say that the land had suffered some injury, of which the possible consequence might be that, at a sale of the *patni*, a difficulty might arise as to finding a purchaser at an adequate price, was a circumstance involving a contingency too remote to be taken into consideration.—(*Maharaja of Burdwan* v. *Wooma Sundari Dasi*, 10 W. R., 12).

What are chakeran lands.

Chowkidari Chakeran Lands.—In *Jaikrishna Mukherji* v. *Collector of East Burdwan* (1 W. R., P. C., 26; 10 Moo. I. A., 15), it was explained that, before the British possession of India, the zamindars were entrusted as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their district, and that they were accustomed to employ not only armed retainers, but also a large force of *thanadars* or a general police-force, and other officers under the names of *chowkidars*, *paiks* and other descriptions as well for the maintenance of order as for the protection of their property, the collection of their revenue and other services personal to them. All these different officers were at that time the servants of the zamindars, appointed by them and removable by them, and they were remunerated in many cases by the grant of land rent-free or at a low rent in consideration of their services. The lands so granted were called *chakeran* or service lands.

Rights of a zamindar and of a patnidar to resume chakeran lands.

Section 48 of the Village Chowkidari Act of 1870 (Act VI of 1870), enacts: "All *chowkidari chakeran* lands assigned for the benefit of any village in which a *panchyat* shall be appointed, shall be transferred to the zamindar of the estate or tenure in which such lands may be situated." Section 51 of the same Act provides:—"Such order shall operate to transfer to such zamindar the land therein mentioned, subject to the amount of assessment therein mentioned, and subject to all contracts theretofore made in respect of, or by virtue of, which any person other than the zamindar may have any right to any land, portion of his estate or tenure, in the place in which the land may be situate." The question sometimes arises, whether the effect of the resumption-proceedings under these sections is to create a new title and separate estate in the zamindar to the benefit of which the *patnidar* has no claim. In *Kasim Sheik* v. *Prosunno Kumar Mukerjee*

(I. L. R., 33 Cal., 596), it was *held* that this was the effect, but this view was dissented from in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (I. L. R., 34 Cal., 109), and it was pointed out that, even if the effect of the resumption-proceedings was to create a "new title" in the zamindar, the rights of the *patnidar* were protected by s. 51 of that Act. The same view was taken in the case of *Purusotam Bose* v. *Khetro Prosad Bose* (5 C. L. J., 143).

Courts must look at the contracts.

In considering the question whether a *patnidar* is entitled to the resumed *chowkidari chakeran* lands, the Courts must look at the contracts between the parties to see what their intention was. The rule of law is that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." Unless, therefore, there is an express reservation, the *patnidar* is entitled to the settlement of the resumed *chowkidari chakeran* lands. Certain *chowkidari chakeran* lands were resumed by Government and transferred to the holders of the zamindari within which they were situated. Long anterior to this, the whole of the zamindari, excluding certain portions in *khas* possession of the zamindar, had been granted in *patni*. The *patnidar* claimed to be entitled to the resumed lands. The zamindar and the lessee from him resisted the claim on the ground that as, under the *patni* lease, right was reserved to the zamindar to appoint a *chowkidar* upon a vacancy arising in the office, the zamindar was entitled to the lands upon resumption. *Held* that the fact that the zamindar was entitled to make an appointment to the office of the *chowkidar* did not create in him an interest in the lands held by the *chowkidar*, and that such lands upon resumption and transfer to the zamindar would pass to the *patnidar* from whose lease they had not been excepted. (*Girish Chander* v. *Hem Chunder*, 2 C. L. J., 21 n.; 5 C. L. J., 28.) So also in *Harinarain Mozumdar* v. *Mukund Lall Mandal* (4 C. W. N., 814), where a *patnidar*, who enjoyed the services of the *chowkidar* personal to him after the execution of the lease, sought to have transferred to him certain *chowkidari chakeran* lands, which Government had settled with the zamindar under Act VI (B. C.) of 1870, and which the zamindar had sublet to a tenant, it was *held*, on a construction of the lease which extended to the whole of the zamindari except some *lakhiraj* land, that the *chakeran* lands were a part of the *patni* and that the *patnidar* was entitled to possession, but not to *khas* possession. Again, in *Kazi Newaz Khoda* v. *Ram Jadu Dey* (I. L. R., 34 Cal., 109), the zamindar transferred, by a *patni* lease, all the lands appertaining to an estate to the *patnidar* for an annual rent. After the execution of the lease, the *patnidar* enjoyed the services of the *chowkidar*. Subsequently, the Collector resumed all the *chowkidari chakeran* lands situated within the estate under Bengal Act VI of 1870, and transferred them to the zamindar, who again settled the lands with some tenants. The *patnidar* having brought a suit for recovery of possession of these lands on the ground that he was entitled to them under the terms of his lease, it was *held* that he was entitled to do so. In *Kumar Banwari Mukunda Deb Bahadur* v. *Bidhu Sundon Thakur* (12 C. W. N., 459), however, it appeared from the lease that the zamindar appointed and dismissed the *chowkidars* and was in enjoyment of their services since the creation of the *patni* and it was *held* that he was entitled to the lands held by the *chowkidars* after the

resumption of such lands by Government, although there was no express stipulation in the lease to that effect (See also *Nitya Nund Hazra* v. *Maharajadhiraj Bijoy Chand Mahtab*, 7 C. L. J., 593.) In *Pursottum Bose* v. *Khetra Prosad Bose* (5 C. L. J., 143), where a contract between the *patnidar* and the *darpatnidars* provided "that the *chowkidars* shall, when called upon, perform the work of the *mouza* in the same way as they have been performing (such) works from before for the *chowkidari chakeran* lands, but, if in the future, Government on resuming the said lands settled them, then the *patnidar* shall have full power to take settlement of the same," and, as a matter of fact, Government resumed the lands and made a settlement with the zamindar, who in turn settled them with the *patnidar*, and he again with a third person and not with the *darpatnidars*, it was *held* that the *patnidar* had the right to lease the resumed *chakeran* lands to any person he thought fit, that he was not bound to settle them with the *darpatnidars*, and that the *darpatnidars* had no right under the contract to insist upon a settlement of these lands with them.

Additional rent payable by patnidar.

The principle which should determine whether a *patnidar* is liable to pay additional rent or not when resumed *chowkidari chakeran* lands are settled with him was indicated in the case of *Hari Dass Gosswami* v. *Nistarini Gupta* (5 C. L. J., 30), and it was pointed out there that the decision of the question must ultimately depend upon the mode in which the rent was assessed at the inception of the *patni*. If, at the time of such assessment, the profits of all the lands, including the *chakeran* lands, were fully taken into account, the zamindar would clearly have no right to claim any rent in addition to the *patni* rent. If, on the other hand, no rent was assessed at that time in respect of these lands, upon resumption and transfer to the zamindar, the zamindar would be entitled to claim additional rent before the *patnidar* can claim to be put in possession. See also *Rajendra Nath Mukerjee* v. *Hira Lall Mukerjee* (14 C. W. N., 995). The additional rent, if payable, must be fair and equitable (*Gopendra Chandra Mitter* v. *Tara Prosanno Mukherjee*, 1. L. R., 37 Cal., 598). The basis on which this additional rent should be calculated was laid down in the case of *Hari Naryan Mozumdar* v. *Mukund Lall Mondal* (4 C. W. N., 814), referred to above. There the *patnidar* contended that he was entitled to have the *chowkidari chakeran* lands transferred to him on payment by him to the zamindar of what the zamindar had to pay Government, and it was *held* that he was bound to pay such rent for these lands as corresponded to the proportion between the gross collections and the *patni* rent formerly payable by him. In *Kazi Newaz Khoda* v. *Ram Jadu Dey* (I. L. R., 34 Cal., 109), however, it was *held* that the *patnidar* was entitled to obtain possession upon his paying to the zamindar the extra assessment of rent which the zamindar had to pay to Government. In this case the zamindar contended that, in addition to the assessment imposed by the Collector, the *patnidars* were bound to pay him some additional rent. "It may be conceded," observed Mookherjee, J., "that there is some apparent force in this contention, and that, if there were materials on the record corresponding to what were furnished by the parties in the case of *Hari Narain Mozumdar* v. *Mukund Lall Mundal* (4 C. W. N., 814), it might have been necessary to consider whether the *patnidars* were bound to pay any additional rent." In *Gopendra*

Principle.

Basis of calculation.

Chandra Mitter v. *Tara Prosunno Mukerjee* (I. L. R., 37 Cal., 598), again, where the rent, as determined by the Collector at the time of resumption, exceeded by Rs. 15 only the rental arrived at on the basis of the principle suggested in the case of *Hari Narain Mozumdar* v. *Mukund Lall Mandal* (4 C. W. N., 814), the former was held to be a fair and equitable rent. Finally, in *Ranjit Singh* v. *Kali Dasi Debi* (I. L. R., 37 Cal., 57), the Judges, in remanding the case to the Lower Appellate Court for deciding the conditions on which the transfer should be made, directed that the principle laid down in *Hari Charan Mozumdar* v. *Mukund Lall Mondul* (4 C. W. N., 814), should be followed.

Both zamindar and patnidar entitled to participate in sale-proceeds.

It should be noticed, however, that, although the *patnidar* may be entitled to take a settlement of resumed *chowkidari chakeran* lands, the zamindar has still an interest in these lands. This interest, observed Mookherjee, J., in *Hari Dass Gosswami* v. *Nistarini Gupta* (5 C. L. J., 30), is represented by the rent fairly payable by the *patnidar*, whether that rent is part of the rent already assessed or is payable in addition to that rent. Accordingly, it was *held* in that case that when *chowkidari chakeran* lands, after resumption and transfer to the zamindar, are sold for the non-payment of the Government assessment, the zamindar and the *patnidar* are both entitled to share in the surplus sale-proceeds, provided the *chakeran* lands are included within the *patni* grant, and that their respective interests in the sale proceeds would be calculated according to the proportion which the whole of the *patni* rent bears to the profit of the zamindar.

Rights of a rayat settled on the resumed land as against a patnidar.

It sometimes happens that, on resumption, a zamindar settles the *chowkidari chakeran* lands with a third person, and the question arises whether the *patnidar*, on recovering possession, can eject him. The general principle to be followed on such cases was laid down by the Full Bench in *Benode Lall Pakrashi* v. *Kalu Pramanic* (I. L. R., 20 Cal., 708). In this case, a person having, previously to the passing of the Bengal Tenancy Act, been settled on certain land as a *raiyat* and a tenant by a trespasser, and having acquired no right of occupancy at the time the suit was brought, was in 1888 sued for ejectment by the true owner, who had obtained possession of the land from such trespasser through the Court on the 27th January, 1886. The possession of the land in question for the purpose of cultivating it was acquired by him a good many years ago from the persons who at that time were in actual possession of the zamindari within which it was situated, and who were then the only persons who could have given possession of the lands of the zamindari to cultivators. It was not suggested that he did not then obtain possession as a tenant under the *bonâ fide* belief of the title of his landlords. *Held* that such a person acquired the right of a non-occupancy raiyat within the meaning of section 5, sub-section (2) of the Bengal Tenancy Act, and was protected from ejectment by that Act, provided that it was a right *bonâ fide* acquired by him from one whom he *bonâ fide* believed to have the right to let him into possession of the land. So, where a zamindar had sublet resumed *chakeran* lands transferred to him by Government, and where the *patnidar* eventually got a decree against the zamindar for possession, it was *held* that the tenant, with whom the lands had been settled by the zamindar, was entitled to retain actual possession of the lands. (*Hari Narayan Mozumdar* v. *Mukund Lall Mondul*, 4 C. W. N., 814). But where certain

chowkidari chakeran lands were resumed by Government, and made over to the zamindar-defendants who knew full well that, under the terms of the *patni* lease, the *chakeran* lands were included in the *patni*, and that the *patnidar* (plaintiff) was only to pay additional revenue that might be imposed by Government by resumption and settlement with him, *mala fide* allowed the tenant-defendants to remain on the lands and accepted rent from them, it was *held* that the plaintiff was entitled to obtain possession by ejecting the tenant-defendants (*Upendra Narain Bhattacharj* v. *Pratab Chunder Pradhan*, 8 C. W. N., 320; I. L. R., 31 Cal., 703). In distinguishing this case from the case of *Hari Narain Mozumdar* v. *Mukund Lall Mondul* (4 C. W. N., 814) referred to above and the case of *Binod Lall Pakrashi* v. *Kalu Pramanik* (I. L. R., 20 Cal., 708) the Court observed: "In that case (*Hari Narain* v. *Mukund Lall*, 4 C. W. N., 814), the zamindar-defendant seems to have been put in actual possession of the lands by Government and, while in that position, to have let the lands to the tenant-defendants. The plaintiff in that suit did not at first come to terms with him. In the course of that suit it was settled on what terms the plaintiff was to obtain possession of the land, and, when that was done, it was too late to turn out the tenant-defendants, for they had been accepted as tenants by the *de facto* landlord. The case is quite different in the present suit. The zamindar-defendant seems to have accepted the tenant-defendants as his tenants and to have taken rent from them *mala fide*. It has been found by both Courts that he had no right to do this under the terms of the *pottah* he had granted to the *patnidar*, against whom he had no further claim, and of which terms he must have been well aware. The tenant-defendants may have acted *bona fide*, but the zamindar did not. .....In *Binod Pakrashi's* case and the cases in which it has been followed, the *defacto* zamindar was litigating with another or was deprived of his title as the result of a subsequent litigation. It could not be expected that he would let his lands lie fallow and it would be hard on the raiyats if they were afterwards ejected, when it was found that he had no title. Hence they were held to have acquired the status of tenants. But it never was intended to be laid down that a person, knowing that he had no title, could induct persons into lands of others, and that the persons so inducted could not be evicted by the rightful owners. This has been laid down in no case. If this were the law, then any outsider could constitute any other person the tenant of any landlord and deprive such landlord of all right of letting his own land."

These cases were decided on the basis that the *chowkidari chakeran* lands are *raiyati* lands. A different view was taken in the case of *Jonab Ali* v. *Rukibuddin Mallik* (1 C. L. J., 303). In that case J. Harrington was of opinion that such lands, when they are resumed under Act VI of 1870 (B. C.) and transferred to the zamindar, become his *zerait* land. Mookerjee, J. however, held that "the correct view of the matter is that, upon transfer, they are at the disposal of the zamindar to be dealt with by him as *mal* or *zerait* at his option." But, whether they are to be considered as *mal* lands or as *zerait*, both the Judges agreed in holding that a tenant, taking settlement of them *bona fide* from a trespasser, does not acquire the rights of an occupancy or a non-occupancy raiyat, and can, therefore, be ejected. "The question," observed Mookerjee, J., "arises whether a raiyat, who has ob-

tained a settlement of resumed *chowkidari chakeran* land from a person other than the zamindar legally entitled thereto, can successfully claim to have acquired a *raiyati* interest in it as against the true zamindar. In my opinion, the question ought to be answered in the negative. The only authority which has been relied upon by the learned vakil for the appellant in support of the contrary view, *viz.*, the case of *Binod Lall Pakrashi* v. *Kalu Pramanik*, is clearly distinguishable. It was no doubt held in that case that, if a tenant *bonâ fide* acquires a right to hold land for the purpose of cultivating it from a trespasser whom he *bona fide* believed to have a right to let him into possession, acquires the status of a raiyat within the meaning of section 5, c. (2) of the Bengal Tenancy Act. It is manifest, however, from the judgment of Petheram, C. J., that the lands in question in that case were the *raiyati* lands of the zamindari. In my opinion, it would be an unwarrantable extension of the doctrine which underlies that case, if I were to apply it to lands other than *mal* lands. I think there is between the two cases a substantial distinction well founded on principle; in the case of *mal* lands they have to be let out to tenants and various statutory rights may be acquired therein; in the case of *zerait* lands, they belong primarily to the proprietors, and, even if they are let out to tenants, the growth of statutory rights is circumscribed within very narrow limits. Besides, I cannot discover any intelligible principle upon which a trespasser may be taken to have authority to impress upon resumed *chakeran* lands a particular character, which can be determined at the choice of the true owner alone. I am not prepared to assent to any extension of the rule laid down in *Binod Lall* v. *Kalu Pramanik*." The same view was taken in the case of *Kazi Newaz Khoda* v. *Ram Judu Dey* (I. L. R., 34 Cal., 109). Where, therefore, *chowkidari chakeran* lands have been resumed and transferred by the Collector to the zamindar, the interest of the *chowkidar* in those lands and, along with it, all rights created by him in favour of others cease (*Krishna Kinkar Dutta* v. *Mahanto Bhagwan Dass*, 2 C. W. N., 161).

Form of suit to recover possession.

A *patnidar* may sue for the execution of a deed of transfer and for the recovery of *khas* possession of resumed *chowkidari chakeran* lands in the same suit. In *Ranjit Singh* v. *Kali Dasi Debi* (I. L. R., 37 Cal., 57), where certain *chowkidari chakeran* lands had been resumed by Government and settled, under section 50 of the Village Chowkidari Act (VI, B. C., of 1870), with a zamindar who had created a *patni* under which there was a *darpatni* and who had made a *raiyati* settlement, and the *dar-patnidar* brought a suit against the zamindar for *khas* possession of the lands and for the execution of a deed of transfer, on the allegation that the zamindar had transferred his rights in the said lands to the *patnidars*, and the *patnidars* had similarly transferred all their rights, subject to the payment of the respective head rents, it was *held* that the joining of the two prayers for the execution of a deed of transfer and for the recovery of possession was in no way repugnant to any rule of law. A separate suit, however, will probably have to be brought to decide the conditions on which the transfer should be made.

Limitation.

The period of limitation in such cases is governed by Art. 142 or 144 of Sch. II of the Indian Limitation Act (XV of 1877). So in *Ranjit Singh* v. *Radha Charan Chandra* (I. L. R., 34 Cal., 564), where by virtue of a *patni* lease granted by the defendant-landlord in 1854, the plaintiff was entitled to the *chowkidari chakeran* lands of the *mahal*, which were subsequently

resumed by Government and not made over to the zamindar till 1899, it was *held* that, in as much as the lands were not in possession of the plaintiff nor in that of the defendant until they were made over to the latter by Government, the suit was one for the specific performance of the contract of 1854, and the period of limitation applicable would, therefore, be that prescribed by Art. 113, and not Art. 142 or 144, of Sch. II of the Limitation Act. This view was, however, expressly dissented from in *Kumar Bunwari Mukunda Deb Bahadur* v. *Bidhu Sundar Thakur* (12 C. W. N., 459; I. L. R., 35 Cal., 346), where *chakeran* lands were included in the *patni patta* granted by the zamindars to the plaintiffs before the resumption thereof under the Chowkidari Act, and it was *held* that, upon resumption and transfer of the lands to the zamindars, the remedy of the *patnidars* was to bring a suit for recovery of possession, and not a suit for the specific performance of a contract. So also in *Harak Chand Babu* v. *Charu Chandra Singh* (15 C. W. N., 15; 3 C. C. L. 81), it was *held* that a suit by a *patnidar* to recover possession of the *chowkidari chakeran* lands, resumed and transferred to the zamindar, on the basis of the title created in favour of the *patnidar* by the *patni* lease is governed by Art. 142 or 144 of the Limitation Act.

If lakhiraj created before 1790.

Can a patnidar resume lakhiraj land.—In considering this point, the question as to whether a lakhiraj was created before or after 1790 is of some importance. Section 6, Regulation XIX of 1793, confers the power of resuming grants not exceeding 100 bighas, alienated *before* 1790, on the person responsible for the discharge of the revenue of the estate or dependent taluk (such dependent taluks no doubt as are referred to in section 6, Regulation VIII of 1793) in which the land may be situate, and, as there is nothing in Regulation VIII of 1819 to show that the creation of a *patni* (which is spoken of as a "tenure") is a transfer of the zamindar's proprietory rights (see sections 10, 11, Regulation I of 1793), and the zamindar usually remains responsible for the payment of the land revenue, it may well be contended that the zamindar, being the person responsible for the revenue, can alone sue to resume these grants, which, as having been expressly excluded from the settlement, could not be supposed to be included in any lease of the *mal* lands. This view was taken by the High Court in the case of *Obhoy Ram Jana* v. *Syed Mohomed Hossein* (Spl. W. R., 213). There a zamindar sued to resume a piece of lakhiraj land which had been in existence since before 1790, and it was objected that, as he had given his property in *patni* to a third party, he had no right of action. The Court, however, decided that a zamindar, who grants his estate in *patni*, has still such an interest in the property as entitles him to challenge the right of another who asserts to hold it adversely to him on a lakhiraj title, for the proprietory title is in him, and whatever is to the injury of his proprietory title is a valid cause of action to him.

If after 1790.

With respect to grants made *after* 1790, though section 10, Regulation XIX of 1793, expressly authorizes the person possessed of the proprietory right to dispossess the grantees and collect rent, yet as the *patnidar* is beyond controversy an assignee of so much of the proprietory right as entitles him to collect rents, and as, moreover, these grants were included in the *mal* land at the time of the Decennial Settlement, it would seem that the right of resumption here belongs to the *patnidar*. In the case of *Gya Ram Mandal* v. *Gya Ram Naik* (Wy. Rent Rep., 51), a *patnidar* sued under sec-

tion 30, Regulation II of 1819, to resume an alleged lakhiraj tenure situate within his *patni*. It was objected that he had filed no title-deeds showing that a power to resume had expressly been given to him, but the Court held that every right which the zamindar could himself exercise passed to the *patnidar*, and that it was for the defendant, who objected to the exercise by the *patnidar* of an ordinary legal right incidental to his tenure, to give some *prima facie* evidence as to the ground on which that objection was founded before the plaintiff could be called upon to produce his title-deeds. So also in *Soshi Bhusan Bakshi* v. *Mahomed Matain* (4 C. L. J., 548), it was *held* that when a purchaser at a *patni* sale proves his purchase and, on his applying for possession, is resisted by persons holding lands included within the ambit of the *patni* tenure, who set up the defence that the lands held by them are lakheraj and not *mal*, it is for the defendants to prove that the lands have been held not under the *patni* tenure but as lakhiraj. Burden of proof.

Measurement.—See sections 90 and 91 of the Bengal Tenancy Act (Act VIII of 1885). Any person who is a proprietor of an estate has the indisputable right of measurement, unless restrained by any express agreement. The mere existence of under-tenures of any description does not take away his right of measurement. For instance, a zamindar, by granting a *patni* or a *mokurrari* lease, is not restained from making a general survey and measurement of the lands comprised in his estate. So again a *patnidar*, by creating a *darpatni*, does not lose the right conferred upon him by this section—(*Ram Bahadur* v. *Mulloo Ram*, 8 W. R., 149; *Dwarka Nath* v. *Bhowanee Kishore*, 8 W. R., 11; *Tweedie* v. *Ram Narayan*, 9 W. R., 151; *Brojendro* v. *Krishna*, I. L. R., 7 Cal., 684; *Matangini Dassi* v. *Ram Dass*, 7 C. W. N., 93). Right to measure.

Under the old law (Act VI, B. C., of 1862 and Act VIII, B. C., of 1869), it was held that a co-sharer in an undivided estate or tenure is not entitled to apply for meaurement, for, if each shareholder should have separate measurements, it would be productive of great annoyance and harassment to the tenants in the estate—(*Mahomed Bahadur* v. *Raja Rajkishen*, 15 W. R., 522; *Molook Chand* v. *Modu Sudan*, 16 W. R., 126; *Soorendra Mohan* v. *Bhuggobut Chunder*, 18 W. R., 332; *Santiram* v. *Bykunt*, 19 W. R., 280; *Peary Mohan* v. *Raj Kishen*, 20 W. R., 385; *Ishan Chunder* v. *Bussaruddin*, 5 C. L. R., 132). Where, therefore, there were joint proprietors, the notice of an intended measurement of the lands had to be a notice of all the joint proprietors. It was not sufficient that one co-sharer should give notice and make his co-sharer parties to the suit—(*Ishan Chandra* v. *Bussaruddin*, 5 C. L. R., 132). But in *Abdool Hosein* v. *Lal Chand Mahaton* (13 C. L. R., 313; I. L. R., 10 Cal., 36), it was *held* that a single co-sharer was competent to apply for measurement under section 38 of Act VIII of 1869, B. C., if he made his co-sharers parties to the proceeding. Now, under section 188 of the Bengal Tenancy Act (VIII of 1885), there can be no doubt that one or more joint landlords can not measure. They must act together or by an agent authorized to act on behalf of all of them. Can a co-sharer measure?

Onus.—Where a defendant pleads a *patni* tenure, the onus of proof lies on him in the first instance. But when he sets up and proves by credible evidence the creation by the plaintiff of an inferior tenure entitling him to hold the estate, he has discharged the burden, and it then lies on the plaintiffs On patnidar first.

to displace or explain away that evidence. (*Upendra Narain Ghose* v. *Bajpayee Rajah Keshub Chunder Deb and others*, 6 W. R., 25).

Parol evidence admissible.

Parol Evidence.—In *Dhunput Sing Doogur Roy Bahadur* v. *Sheik Jowahurally* (8 W. R., 152), where the plaintiff, the zamindar, sued the defendant, the *patnidar*, to recover possession of a village Abdoolahnagar on the allegation that the village was not included in the *patni* lease, and where the defendant, it appeared, objected at the time of the execution of the *pottah* that no express mention of the village had been made in it, but that the plaintiff's agent satisfied his scruples by declaring that the village held in farm by one Rahamatalleh (which included the village Ahmadnager) was given in *patni* to him, parol evidence was held admissible to explain the deed of lease, the Judges remarking :—" Evidence of every material fact, which will enable the Court to ascertain the nature and extent of the subject matter of the *pottah*, or, in other words, to identify the things to which the instrument refers, is, in our opinion, admissible. The acts of the parties also may be explained by parol evidence." *A* gave a *patni* lease to *B*, which was not registered, and subsequently gave another *patni* lease of the same land to *C*, which was duly registered under the provisions of Act XVI of 1864. *B* sued to compel *A* to register his lease and set aside the subsequent lease granted to *C*. *Held*, *inter alia*, that, the lease being inadmissible in evidence in consequence of non-registration, its existence could not be proved by parol evidence (*Monmohini Dassi and others* v. *Mosst. Bishen Moyi Dassi*, 7 W. R., 112).

S. 195 (*e*) of the Tenancy Act.

Effect of the Bengal Tenancy Act on patni tenures.—The *Patni* Regulations have expressly been saved from the operation of the Bengal Tenancy Act, Act VIII of 1885, by section 195 (*e*) of that Act. That section provides :—" Nothing in this Act shall affect any enactment relating to *patni* tenures, in so far as it relates to those tenures." "The object of section 195 (*e*)," observed the Judges in *Durga Prosad Bandopadhya and others* v. *Brindaban Roy and others* (I. L. R., 19 Cal., 504), "is that nothing in the Bengal Tenancy Act should interfere with the *patni* law in respect of *patni* tenures, but that in other respects the Bengal Tenancy Act should be held to apply as supplementing the *patni* law." So, where the plaintiffs, who were the sons and representatives of one Peary Mohan Bandopadhya who had died in Falgoon 1295 (February-March 1899), brought a suit for the recovery of the arrears of rent from 1293 to *Pous* 1295 for lands held by the defendants within their ancestral *patni taluk*, and where the defendants contended that the plaintiffs, not having complied with the provisions of section 15 of the Bengal Tenancy Act, could not recover any rent payable by them as holders of the tenure by suit in Court, it was *held* that sections 15 and 16 of the Bengal Tenancy Act applied to *patni* tenures. "Under section 16 of the Bengal Tenancy Act," observed the District Judge (and his observations were quoted with approval by the High Court), "it is only the rent payable to a person entitled to a permanent tenure by succession as the holder of the tenure, which cannot be recovered by suit until the provisions of section 15 have been complied with. But the plaintiffs are not entitled to the arrears of rent due for the period prior to Falgoon 1295 as the holders of the tenure. They are entitled to these arrears as the representatives of their father's estate, which it is not denied that they are.....I, however, agree with the Munsif that, as

Tenancy Act supplements patni regulation.

regards the rent accruing subsequently to *Falgoon* 1295, they cannot recover this rent, until they have complied with the provisions of section 15, Act VIII of 1885, which, it is admitted, they have not done. I have been referred to the provisions of section 195 (*e*) of the Bengal Tenancy Act and to the case of *Gyanada Kanto Roy Bahadur* v. *Bromomoyi Dassi* (I. L. R., 17 Cal., 162). I do not, however, think they affect the matter. Section 195 (*e*) merely lays down that nothing in the Tenancy Act shall affect the provisions of any enactment relating to *patni* tenures so far as it relates to these tenures. But section 15 of the Tenancy Act in no way affects any provisions of Regulation VIII of 1819. Regulation VIII of 1819 provides no procedure for the registration of changes in the holders of *patni* tenures which are affected by death and operations of law. The provisions of section 5 of the Regulation, which lays down that a zamindar shall not be competent to refuse to register and otherwise give effect to alienations by discharging the party transferring his interest from personal liability, and by accepting the engagements of the transferee, but that he shall be entitled to exact a fee upon every such alienation, clearly apply only to voluntary alienations, and not to successions and transfers by operations of law. There is nothing in Regulation VIII of 1819 about changes by succession and operations of law. It is not said that the zamindar must recognise such changes, or is entitled to exact a fee for registering them. Hence, the provisions of section 15 of the Bengal Tenancy Act, which do prescribe such a procedure, cannot be said in any way to affect any provision of any enactment relating to *patni* tenures. For similar reasons the ruling in *Gyanada Kanto Roy Bahadur* v. *Bromomoyi Dassi* does not apply to these cases. In that case it was laid down that section 13 of the Tenancy Act does not apply to *patni taluks*, for there is a special procedure laid down in Regulation VIII of 1819 for the admission to registry of voluntary transfers of such tenures. But that ruling does not lay down that section 15 of the Tenancy Act shall not affect *patni* tenures. If the provisions of section 15 of the Bengal Tenancy Act be given effect to in respect to successions to *patni* tenures, there will be no anomalous dual registry to press hardly on the heirs and representatives of deceased *patnidars*. Hence I see no reason why the provisions of section 16 of the Bengal Tenancy Act should not be held applicable to the suit so far as the rent claimed for the period after Falgoon 1295 is concerned." (*Durga Prosad Bandapadhya and others* v. *Brindabun Roy and others*, I. L. R., 19 Cal., 504). So also in *William Sheriff* v. *Jogemaya Dassi and others* (I. L. R., 27 Cal., 535), where a suit for arrears of rent for the years 1299 B. S. to *Falgoon* 1302, B. S., was brought by *patnidars* on the death of the last owner on the 14th *Aghran* 1302, B. S., and where the defence of the *darpatnidar* mainly was that the plaintiffs not having complied with the provisions of section 15 of the Bengal Tenancy Act, the suit was not maintainable, it was *held* that as the plaintiffs did not claim the rent, which fell due during the lifetime of the last owner, as the holders of the tenure, but claimed it either as the representatives of the holder of the tenure for the time being, or as representatives of their father, the rent became an increment to the estate of the father, and, therefore, the suit was maintainable.

S. 15 of the Tenancy Act applies to patni tenures.

The provisions of section 13 of the Bengal Tenancy Act, however, do not apply to *patni* tenures. In *Gyanada Kanto Roy Bahadur and others* v. *Bromo-*

S. 13 of the Tenancy Act does not.

moyi Dasi (I. L. R., 17 Cal., 162), the interest of the defendants in the *patni* was sold in execution of a decree (other than a decree for arrears of rent due in respect thereof) on the 12th *Falgoon*, 1293, and was purchased by one Bromomoyi Choudhurani, who, by virtue of her purchase, obtained possession of the *patni*, and deposited in Court what is called the landlord's fee and the further fee for service of notice of sale on the landlord as required by section 13 of the Bengal Tenancy Act. Bromomoyi Chowdhurani was in possession since the purchase, but the notice or the fee was not proved to have been received by the plaintiff. The plaintiff refused to recognise the sale and brought a suit against the defendants for arrears of rent of the *patni taluk* from *Kartik* 1293 to *Aghran* 1294 (*i.e.*, for the rent which had accrued subsequent to the sale), contending that section 13 of the Bengal Tenancy Act had no application, because the rules to be observed on the transfer of a *patni* tenure were contained in Regulation VIII of 1819 which was, under section 195 (*e*) of the Bengal Tenancy Act, not affected by that Act, and that, as the rules of the Regulation as to registration of the purchase had not been observed by the purchaser, he was not bound to recognise the sale, and that she was entitled to recover arrears of rent from the defendants, who were the heirs of the *patnidar* whose name was recorded in his books. *Held*, *inter alia*, that Regulation VIII of 1819 is not affected by the Bengal Tenancy Act of 1885, the Regulation being specially saved from its operation by section 195 (*e*) of that Act. "There remains the question," observed the Court, "whether section 13 of Bengal Tenancy Act has any application to the present case. If it has, then this curious state of things will arise that, under the enactments at present in force (Regulation VIII of 1819 has not been repealed), there will be two totally different systems of registration of certain transfers of *patni* tenures. The Bengal Tenancy Act has introduced what may be called a system of public and official registry of transfers of permanent tenures under which the landlord's fee has to be paid to, and the notice of transfer to be served on, him through the medium of the District Collector, while, under the law relating to *patni* tenures, the registration of transfers is of a private nature, as it has to be made in the *sherista* of the zamindar, and the prescribed fee has to be paid or tendered directly to him without the intervention of any public officer. If this dual system be in force, then the purchaser in the present case would have the option of following the procedure provided in section 13 of the Tenancy Act instead of proceeding under the *Patni* Regulation,—a procedure which is clearly in derogation of the right of the zamindar under Regulation VIII of 1819 to have the transfer registered in his books in accordance with the rules therein laid down, and which, therefore, affects an enactment which is specially saved from the operation of the Bengal Tenancy Act by section 195 (*e*) of that Act." The principle deducible from these rulings has been summed up by Mr. Justice Mitter in his Land Law of Bengal as follows:—"In matters in which the Regulation, as it now stands with the amendments, is silent, Act X of 1859 and the other Acts, dealing with the incidents of the relationship of landlord and tenant, furnish rules of substantive law and procedure; but the express provisions of the Regulation have not been, in any way, affected by them."

Principle deducible from the rulings.

Observe, however, that *darpatni* tenures are not included within the terms of clause (*e*) of section 195. "The words 'in so far as it relates to

those tenures must, we think, be treated as expressly limiting the provision to enactments relating to *patnis* properly and strictly so called, and as intended to exclude those which relate to tenures, which, although resembling *patnis*, as *darpatnis*, &c., are not strictly *patnis*, not possessing all the qualities of them." (*Mahomed* v. *Broja Sundari*, I. L. R., 18 Cal., 360.) Section 13 of the Bengal Tenancy Act, therefore, applies to sales of *darpatni* tenures in execution of decrees (*Mahomed Abbas Mandal* v. *Brojo Sundari Debi*, I. L. R., 18 Cal., 360).

Leases fixing rent in perpetuity or for a longer term than ten years declared valid, though executed while section 2, Regulation XLIV, 1793, was in force.

2. It is hereby declared that any leases or engagements for the fixing of rent now in existence, that may have been granted or concluded for a term of years or in perpetuity by a proprietor under engagements with Government, or other person competent to grant the same, shall be deemed good and valid tenures according to the terms of the covenants or engagements interchanged, notwithstanding that the same may have been executed before the passing of Regulation V, 1812, and while the rule of section 2, Regulation XLIV, 1793,(1) which limited the period for which it was lawful to grant such engagements to ten years, and declared all that might be entered into for a longer term to be null and void, was in full force and effect; and notwithstanding that the stipulations of the said leases may be in violation of the rule in question; provided, however, that nothing herein contained shall be held to exempt any tenures held under engagements from proprietors of estates paying revenue to Government from liability to be cancelled on sale of the said estates for arrears of the said revenue, unless especially exempted from such liability by the sale in question or by any other specific rule of the Regulations in force.

Notes.

Existing leases validitated.

Existing leases made valid.—"Reg. XLIV of 1793, s. 2, declares that 'no zamindar shall grant *pottas to raiyats* or other persons for the cultivation of lands for a term exceeding 10 years'; and further, that 'every *potta* which has been or may be granted in opposition to such prohibition shall be null and void.' This was repealed by Reg. V of 1812, s. 2; but Reg. XLVII of 1803 declared such leases to be null and void 'only so far as respect the *jama* or rent thereby illegally stipulated, without affecting any other rights which the parties may respectively possess or to which they may be entitled.' These Regulations were followed by Reg. V of 1812, s. 2 of which declared that 'proprietors of lands should be competent to grant leases for any period which they may deem most convenient to themselves and their tenants, and most conducive to the improvement

(1) Reg. XLIV, 1793, has been repealed by Act XXIX of 1871.

of their estates.' Thus the prohibition against granting leases for terms exceeding 10 years was removed; but no provision was made for rendering valid those leases which had been granted in violation of the prohibition whilst it remained in force. In order to remedy this omission, Reg. VIII of 1819 was passed. The Preamble to that Regulation, after reciting the previous Regulations upon the subject, proceeds thus:—'In practice, the grant of *taluks* and other leases at a rent fixed in perpetuity had been common with the zamindars of Bengal for sometime before the passing of the two Regulations (V and XVIII of 1812) last mentioned; but, notwithstanding the abrogation of the rule which declared such arrangements null and void, and the abandonment of all intention or desire to have it enforced as a security to the Government revenue in the manner originally contemplated, it was omitted to declare in the rules of Regs. V and XVIII of 1812, or in any other Regulation, whether tenures at the time in existence and held under covenants or engagements entered into by the parties in violation of the rule of s. 2, Reg. XLIV of 1793, should, if called in question, be deemed invalid and void as heretofore. This point it has been deemed necessary to set at rest by a general declaration of the validity of any tenures that may be now in existence, notwithstanding that they may have been granted at a rent fixed in perpetuity, or for a longer term than ten years, while the rule fixing this limitation to the term of all such engagements, and declaring null and void any granted in contravention thereto, was in force.' This being the Preamble, s. 2 of the Regulation declared in effect that any such leases then in existence, which might have been granted for a term of years or in perpetuity, should be deemed good and valid tenures according to the terms of the covenants or engagements interchanged, notwithstanding that the same might have been executed before the passing of Regulation V of 1812, and while the rule of s. 2, Reg. XLIV of 1793, was in full force and effect." (*Sheo Prasad Sing* v. *Kali Das Sing*, I. L. R., 5 Cal., 543.)

Patni tenures declared valid, transferable, and answerable for debt.

3. *First.*—The tenures known by the name of *patni taluks* as described in the preamble to this Regulation, shall be deemed to be valid tenures in perpetuity, according to the terms of the engagements under which they are held. They are heritable by their conditions; and it is hereby further declared that they are capable of being transferred by sale, gift, or otherwise, at the discretion of the holder, as well as answerable for his personal debts, and subject to the process of the Courts of Judicature, in the same manner as other real property.

Patnidars' right of under-letting declared.

Second.—*Patni talukdars* are hereby declared to possess the right of letting out the lands composing their *taluks* in any manner they may deem most conducive to their interest, and any engagements so entered into by such *talukdars* with others shall be legal and binding between the parties to the same, their heirs and assignees: provided, however, that no such engagements shall operate to the prejudice of the right of the zamindar to hold the

superior tenure, answerable for any arrear of his rent, in the state in which he granted it free of all incumbrance resulting from the act of his tenant.

Third.—In case of an arrear occuring upon any tenure of the description alluded to in the first clause of this section. it shall not be liable to be cancelled for the same, but the tenure shall be brought to sale by public auction, and the holder of the tenure will be entitled to any excess in the proceeds of such sale beyond the amount of the arrear of rent due, subject, however, to the provisions contained in section 17 of this Regulation.

Patni tenures declared not voidable for arrears.

Notes.

Patni tenures valid in perpetuity.—"By s. 3 of that Regulation (Reg. VIII of 1819), *patni* tenures are declared valid, transferable and answerable for debts.....By that section these tenures are made transferable in perpetuity and are transferable by sale, gift, or in any way which the *patnidar* thinks fit, so that by virtue of that section these tenures are made actual property in the land which the holder of them may dispose of as he chooses" (*per* Petheram, C. J., in *Joykishna Mukopadhya* v. *Surjanessa*, I. L. R., 15 Cal., 345). A *patnidar* is, therefore, entitled to exercise all the rights of ownership with respect to the land which the zamindar himself might, but for the *patni*, have exercised (1 Hay's Report, 65; Marshall's Reports, 28). He is not, however, a proprietor within the meaning of ss. 38 and 78 of the Land Registration Act. It is not, therefore, necessary for him to register his name under that Act to entitle him to sue for rent. (*Sakurulla Kazi* v. *Bama Sundari Dassi*, I. L. R., 24 Cal., 404.) A zamindar, who gives his estate in *patni* lease, has, however, still such an interest in the property as entitles him to challenge the right of another who asserts to hold it adversely to him on a lakheraj title, for the proprietory title is in him, and whatever is to the injury of his proprietory title is a valid cause of action to him. (*Obhoy Ram Jana* v. *Syad Mohomed Hossein*, Spl. W. R., 213.) There is nothing to prevent a zamindar from granting away a portion of his remaining rights and to create a tenure (*patni* or otherwise) intermediate between himself and the *patnidar*. (*Raj Kumar Muzumdar* v. *Probhat Chandra Ganguli*, 9 C. W. N., 656.) The question arose again incidentally in the case of *Bibi Jarad Kumari* v. *Hanifuddin Akan* (14 C. W. N., 389), and the Judges observed as follows:—"Although we do not think it necessary to express any definite opinion whether a zamindar can create a permanent tenure immediately between his estate and a *patni taluk*, we may say, on a reading of Reg. VIII of 1819, that our inclination is to answer that question in the negative." This, however, is merely an expression of opinion and is not binding. The Board of Revenue also held in one case that a zamindar cannot create a right intermediate between himself and the *patnidar*. In that case, *A*, a zamindar, purchased by private sale a *pargana*, of which some villages had already been let in *patni* by the former proprietors and the other villages were in *khas* possession. He executed a deed by which he created in favour of *B* a *patni taluk* of the villages in *khas* possession, and by the same instru-

Patnidar can exercise same all rights of ownership as zamindar.

But he is not proprietor as defined in the Registration Act.

Zamindar has still an interest left.

Board's Proceedings.

ment he gave *B* a *sarbarakari* lease of all the *patni mahals* previously created. The deed reserved certain rents and declared that the two interests thus created should be inseparable, and that *B* should have no power to transfer the one without the other. But it was declared that the whole united interest was transferable, and that, on any default being made by *B* in payment of the reserved rent, *B's* interest should be liable to sale under the *patni* Regulation. *A*, the zamindar, applied for the sale of the *patni* created in favour of *B*. The Collector refused the application. The appeal to the Commissioner was also rejected. On the case coming up to the Board, on appeal, they, on the advice of the Legal Remembrancer, *held* that the interest assigned to *B* by the lease is not a tenure within the meaning of cl. 1, s. 8 of Reg. VIII of 1819, and consequently the stipulation, that it shall be liable to sale under the Regulation, is of no effect. *Held* further that when a *patni* already exists the zamindar cannot give a lease of the lands. (Board's Miscellaneous Proceedings of 2nd September, 1882, No. 128, Collection 7, File 3124 of 1882.)

Patni taluk imports hereditary tenures.

Patni tenures are heritable by their conditions.—The term "*patni taluk*" *primâ facie* imports a hereditary tenure. In *Tarini Charan Ganguli & others* v. *Watson & Co.* (3 B. L. R., A. C., 437; 12 W. R., 413), the Court *held* that the term "*patni taluk*" *primâ facie* imports a hereditary tenure. Markby, J., observed:—"We concur with the Judge that the term '*patni taluk*' *primâ facie* imports a hereditary tenure. We know of no instance in which the term '*patni taluk*' has ever been applied to an interest which is to last for the life of the grantee only. We doubt if a single instance could be produced in which the term has been so used. As an instance in which the word is used in a very marked manner as implying *ex vi termini* heritability, we may refer to the case of *Daya Ram* v. *Bhobindur Narain*, (S. D. A., 1806, p. 139) where the plaintiff claimed a '*taluk*,' but the Court held he had only a '*mowrosee ijarah*.' There is a note appended to this case by Sir W. Macnaghten, in which he says a '*taluk*' and a '*mowrosee ijarah*,' though both hereditary, differ in some important points. We also think that the inference, which arises from the use of the word '*taluk*,' is strengthened by the addition of the word '*patni*.' *Patni taluks* throughout Bengal owe their validity entirely to Reg. VIII of 1819, and we think it quite a legitimate inference that, when these parties used the words '*patni taluk*,' and referred to that Regulation, they meant to describe an estate of the same general nature and with the same general qualities as the *patni taluks* described in that Regulation, one prominent feature of which is that they are hereditary. We do not hold that anything in that Regulation prohibits or impedes a zamindar from granting a tenure which is not hereditary, nor do we derive the heritability of the tenures now under consideration from any enactment in that Regulation. We refer only to the preamble as showing what in the common understanding of persons acquainted with such matters and in the ordinary use of language is meant by the expression '*patni taluk*,' and we have no doubt whatever that, when a man grants a *patni taluk*, he clearly means a heritable tenure. If he intends to grant anything else, the term would be misapplied; and nothing but an express declaration that a heritable tenure was not intended would be sufficient to show that the term was used in so exceptional a sense." So also in *Khaja Ashanoollah* v. *Kalee Mohun Mukherjee and another* (18 W. R., 468), where a suit was brought

to recover possession and mesne profits of 12-ans. of what the plaintiff described as a *patni taluk* in certain *mouzahs*, it was *held* that where the word "*taluk*" occurs without any sort of qualification and restriction, it refers *primâ facie* to a hereditary interest.

Transfer of a Patni tenure.—See s. 11 of the Bengal Tenancy Act. A tenure in the nature of a *patni taluk* is by its very nature alienable. The question was raised in *Tarini Charan Ganguli* v. *Watson & Co.* (12 W. R., 413), when Markby, J., observed:—"There can be no doubt that a tenure in the nature of a *patni taluk* is by its very nature alienable. Though, of course, we do not mean to deny that it is a tenure, yet the relation between zamindar and talukdar has scarcely any analogy to the ordinary one of landlord and tenant. The zamindar parts with all control over his property and all interest in it except to an annual rental, which has been likened in England to what is called *quit-rent*. The interest of the zamindar only requires that the *taluk* should be kept whole and entire, so that his security for the rent may not be diminished. There is nothing in the smallest degree partaking of a personal character in the relation between him and the talukdar." In this case a *pottah* granting a *patni taluk* contained clauses prohibiting the transfer of its lands by sale or gift, and the clauses were construed as intended to prevent alienation, not of the entire *taluk*, but only of portions of the land. "We agree with the District Judge," remarked the Judges, "that these clauses were inserted, not to prevent alienation of the entire *patni taluk* as such which could in no way affect the interests of the zamindar, but to prevent any alienation of portions of the land, whereby, in case of default in payment of the *patni* rent, doubts might arise as to what was and what was not liable to be sold for arrears. We decide the question in the terms in which it has been raised; but we do not thereby intimate our opinion that, even if alienation were prohibited, the tenure would in this case have been forfeited to the zamindar. The question has not been raised." So also in *Brindaban Chandra Chowdhury* v. *Brindaban Chundra Chowdhury Sircar*, (1 L. R., I. A., 178; 13 B. L. R., 409; 21 W. R., 324), the Privy Council *held* that, "under the description '*patni taluk*,' and '*darpatni taluk*,' it must be *primâ facie* intended that the tenure called a *patni* tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale."

A Patni tenure alienable.

Transfer of a portion of a patni taluk.—See ss. 17 and 88 of the Bengal Tenancy Act. A portion of a *patni taluk* cannot be sold under the provisions of Regulation VIII of 1819 (*Mahadeb Mandal* v. *Cowell*, 15 W. R., 445). Nor can a *patni taluk* be divided except by an act of the zamindar or by an act recognized by him. A *patnidar* may generally transfer his tenure without the consent of his zamindar, but he can only do so *in solido*; and the transfer of a portion in no way affects the existence of the *patni* in its entirety or the rights of the zamindar (*Jadoo Nath Shah* v. *Jadab Chundra Thakoor*, 11 W. R., 294.) So also in the case of *Watson & Co.* v. *Collector of Rajshahie* (12 W. R., P. C., 43; 2 P. C. R., 269; 3 B. L. R., P. C., 48; 13 Moore, 60) it was *held* that, when a share in a *patni taluk* is transferred by a registered *patnidar* without the express consent of the zamindar and in disregard of the Regulation, the transfer is not binding on the zamindar. It does not,

A portion cannot be sold under the Reg.

A transfer of a portion not binding on the zamindar.

But it is not absolutely void.

however, follow that such a transfer is absolutely null and void. "Though clause 1, s. 3 of the Regulation," observed the Judges in *Madhab Ram* v. *Doyal Chand Ghose* (I. L. R., 25 Cal., 445), "speaks of the entire *patni*, section 6 affords indication of the validity, under certain conditions, of a transfer by the *patnidar*, extending, not only to fractional or aliquot parts of a *patni taluk*, but also to any alienation other than that of entire interest, that is, to any alienation of the interest in any portion of the *patni taluk*, such portion not being an aliquot part or share, but being a portion of the land composing the *patni*." In *Saurendro Mohon Tagore* v. *Sarnomoyi*, (I. L. R., 26 Cal., 103), it was decided that, although the transferee of a fractional share of a *patni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for the rent jointly and severally with the registered tenant, if the landlord chooses to recognise him as one of the joint holders of the *patni*, and he is also liable for the entire rent of the *patni* estate. Similarly, in *Aosubali Pramanik* v. *Bisseshuri* (8 C. L. J., 554), it was ruled that the purchaser of a share of a *patni* acquires a valid title in the property, although the purchaser is not recognised by the zamindar. He is not exempted from liability for rent jointly with the transferor, if the landlord chooses to recognise him as one of the joint holders of the *patni*. Section 6 of the Regulation only prevents any splitting up of the tenure and apportionment of the rent without the sanction of the landlord. "We think," observed the Judges in this case, "that, having regard to the case of *Saurendro Mohon Tagore* v. *Sarnomoyi* (I. L. R., 26 Cal., 103), and ss. 5 and 6 of Regulation VIII of 1819, it would be impossible to hold that a transfer of a portion of a *patni* without the consent of the zamindar is altogether void, although no doubt the zamindar is entitled to say that the division is not binding upon him and the purchaser cannot compel any apportionment of the rent reserved."

Such a transferee is liable jointly and severally for the rent.

A transferee of a portion of a *patni taluk* is however, as indicated above, liable for the rent jointly and severally with the registered tenant (*Saurendro Mohon Tagore* v. *Sarnomoyi*, I. L. R., 26 Cal., 103; *Aosubali Pramanik* v. *Bisseshuri*, 8 C. L. J., 554). So also in *Jogemaya Dassi* v. *Girindra Nath Mukherjee* (4 C. W. N., 590), it was *held* that he is jointly liable with his co-sharer for the whole rent, for, although the privity between the parties may be one of estate only, it is in respect of the whole of the tenure (though the transfer was only of a part) by reason of the indivisibility of the tenure without the consent of the landlord. The principle enunciated in this case was extended a little further in *Kishori Raman Kapuria* v. *Ananta Ram Laha* (10 C. W. N., 270), where it was *held* that where a *darpatnidar*, to the knowledge of his own landlord, transferred a portion of the *darpatni* to one person on one date, and the remainder to another person on a subsequent date, the liability of the *darpatnidar* for rent, after the second transfer, ceased, and the two transferees became jointly and severally liable to the landlord for the same.

But his liability ceases when whole tenure is transferred.

"Reading sections 17 and 88 of the Bengal Tenancy Act together," observed Geidt, J., in delivering the judgment, "I am of opinion that the true conclusion is, not to forbid the transfer of a share in a tenure, but to render the transferee jointly liable with the transferor for the rent and this view of the law has been adopted in the case of *Jogemaya Dassi* v. *Girindra*

Nath Mukherjee (4 C. W. N., 590). When, therefore, the first transfer was made, the *darpatnidar* and the transferee were jointly liable for the rent. When the second transfer was made, by which the original *darpatnidar* ceased to have any rights in the tenure, it appears to me that the effect was to make the two sets of transferees liable for the rent. In this view of the law, the provisions of s. 88 have not been in any way infringed, and, at the same time, the provisions of s. 17 have been given effect to. The landlord is still entitled to regard the *darpatni* as one undivided tenure, and to hold the entire body of transferees jointly and severally liable for the rent." This decision was, however, doubted by Maclean, C. J., in the same case. "The act of the transferor," he said, "in transferring the tenure piecemeal had the effect, as I think, of dividing the tenure, and, if that is so, that division would not be binding on the landlord unless with his written consent, and, if it is not binding on the landlord, it is difficult to see how the original transferor is freed from his original liability." He did not, however, feel his doubt sufficient to justify him in differing from the conclusion arrived at by Geidt, J. So also in *Kali Sundari Debya* v. *Dharani Kanta Lahiri* (10 C. W. N., 172; I. L. R., 33 Cal., 279), it was decided that when the holder of a permanent tenure transfers a portion of it, and the transferee holds that portion separately and is allowed to pay proportionate rent for the same to the landlord for a great many years, his liability for rent to the landlord ceases upon sale by the transferee of that portion of the tenure.

Liability of tenants.

Liability for rent on change of landlord or after transfer of tenure.—See s. 72 of the Bengal Tenancy Act. A landlord can create a tenure intermediate between himself and his tenants, but the latter are not bound to pay rent to the tenure-holder, till they have received notice of the assignment (*Mansur Ahmed* v. *Azizuddin*, Spl. W. R., Act X., 129). A parcel of land, being a portion of the land composing a *patni*, can be sold in execution of a decree against the *patnidar*, and the tenant will be liable to pay rent to the purchaser after receipt of notice of the purchase (*Madhab Ram* v. *Doyal Chandra Ghose*, 2 C. W. N., 108; I. L. R., 25 Cal., 445). If a raiyat without notice of the assignment of his landlord's interest pays his rent to the former landlord, the transferee cannot recover from him the rent so paid (*Nilmoni Rai* v. *Hills*, 4 W. R., Act X, 38). If tenants after having had notice of the purchase of a zamindari choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their own peril, and cannot plead such payments in answer to a suit for rent by the new owner (*Collector of Rajshahie* v. *Hara Sundari Debi*, Spl. W. R., Act X, 6). The same rule applies when tenants continue to pay rent to co-sharer landlords after notice of the acquisition by a third party of an interest in the land (*Azim* v. *Ram Lall Shaha*, I. L. R., 25 Cal., 330).

Civil Courts can apportion rent.

Apportionment of rent.—Civil Courts can apportion rents on a suit being brought for the purpose. In *Srinath Chandar Chawdhuri* v. *Mohesh Chandra Bandopadhya* (1 C. L. R., 453), seven mouzahs had been let in *patni* to certain tenants by the zamindar; three of these were bought by *A* at a sale in execution of a money-decree against the zamindar, and the other four by *B*. Subsequently, *A* brought a suit against the *patnidar* to have his share of the *patni* rent apportioned, making *B*, the purchaser of the other *mouzahs*, a party to the suit. *Held* that the suit was properly framed. But in *Kalee*

Chunder v. *Ramgutty* (25 W. R., 95), which was a suit for rent brought by an assignee of a portion of the interest of a certain landlord, it was *held* that, where a landlord lets out land at a certain rent, the rent being payable in one sum for the whole, and the land not being let to the tenant in separate parcels in respect of each of which there is a separate assessment of the rent, he cannot, without consent of the tenant, alter the position of the latter, and say that, in future, so much of the rent shall be payable in respect of one parcel only of the land and so much in respect of another parcel. See also *Beni Madhab Ghose* v. *Thakur Dass Mandal* (B. L. R., F. B., 588; 6 W. R., Act X, 71); *Annada Charan Rai* v. *Kali Kumar Rai* (I. L. R., 4 Cal., 89); *Ishar Chandra Datta* v. *Ram Krishna Dass* (I. L. R., 5 Cal., 902; 6 C. L. R., 421); *Rajnarain Mitra* v. *Ekadasi Das* (I. L. R., 27 Cal., 479; 4 C. W. N., 494). A purchaser at a sale, in execution of a decree of one of several estates let in one *patni*, is not bound by any agreement between the *patnidar* and other zamindars regarding their shares of the entire *patni* rent. Nor can he claim from the *patnidar*, as his own share of the *patni* rent, a sum bearing the same proportion to the whole *patni* rent as a sudder *jama* bears to the sudder *jama* of all the estates let out in *patni*. In order to obtain redress in such a case, either the *patnidar* or one or all the zamindars may have their fixed *patni* rent properly apportioned among the several zamindars by a civil suit, in which all the zamindars should be parties (*Poresh Nath Roy* v. *Bisho Nath Dutt*, Spl. W. R., Act X, 16).

Partition amongst landlords binding on patnidars.

Partition.—See sections 17 and 88 of the Bengal Tenancy Act. A partition amongst the landlords is binding on the *patnidar*. On a partition, a *taluq* is split up and each co-sharer is entitled to consider the land allotted to him as his distinct *taluk*. The rent is thus split up and a single *taluk* converted into a number of separate *taluqs*. The effect of a partition under the Estates Partition Act is the same as that under the Bengal Tenancy Act.

Partition amongst Patnidars is not binding on landlord.

Although, however, a partition amongst landlords is binding on the patnidar, a partition amongst *patnidars* does not bind the landlord. No doubt a *patnidar* has a right to demand and enforce partition or, in other words, a right to be placed in a position to enjoy his own rights separately and without interruption or interference by others, but such a partition, if made without the consent of the landlord, would not do away with his liability to be held responsible for the whole of the *patni* rent without reference to the division made among the co-sharers. Accordingly, it was *held* in *Rani Shama Sundari Debi* v. *Jardine, Skinner and others* (3 B. L. R., Appen., 120; s. c., 12 W. R., 160), that a suit for partition by a joint owner of a *patni taluk* will lie, but such partition will not affect the liabilities of the *patnidars* under their several contracts with the zamindars. Similarly, in *Gouree Sunkar Ray* v. *Anund Mohon Moitro and others* (9 W. R., 487), it was *held* that there is no statutory bar against a raiyat's right to partition as between himself and his co-parcener, where he does not ask for an "apportionment of the *jama*, or reserved rent," prohibited by section 6, Regulation VIII of 1819, or, in other words, where he does not ask for such a distribution of the *patni* rent as would bind the zamindar, or limit his right over the whole tenure as a joint one. Again, in *Jadoo Nath Shah* v. *Jadab Chandra Thakoor* (11 W. R., 294), it was said that a *patni taluk* cannot be divided except by an act of

the zamindar or by an act recognised by him: the transfer of a portion in no way affects the existence of the *patni* in its entirety or the rights of the zamindar.

But a landlord may recognise partition.

There are, however, several ways in which a landlord may recognise the division of a tenure. He may do so either formally by actually dividing the tenure into parts, or impliedly by receiving rent from parties holding separately (*Uma Charan Banarji* v. *Raj Lakhi*, I. L. R., 25 Cal., 19). In *Bharat Chandra* v. *Ganga Narain* (14 W. R., 211), it was ruled that a zamindar, by accepting rent, assents to a transfer which involves a subdivision of a tenure. Again, in *Kali Sundari Debya Chowdhurani* v. *Dharani Kanta Lahiri* (10 C. W. N., 272), where the holder of a permanent tenure transferred a portion of it, and the transferee held that portion separately and was allowed to pay proportionate rent for the same to the landlord for a great many years, it was *held* that, upon sale by the transferee of that portion of the tenure, his liability for rent to the landlord ceased and that his act did not have the effect of subdividing the tenure. See also *Baistab Charan Chaudhuri* v. *Akhil Chandra Chowdhury* (11 C. W. N., 217). And in *Nobo Kishen* v. *Sreeram* (15 W. R., 255), it was decided that a written consent to a partition was not necessary, when a zamindar himself put a tenure up for sale in separate lots, and took rent from two of the purchasers separately. "No doubt," observed Glover, J., in this case, "there is no consent in writing on the part of the zamindar, but the inference that he did consent to the partition is of the strongest kind. It was by his own deliberate act that the tenure was put up for sale in separate lots, and it is not denied that he has since the sale taken rent from two of the purchasers of these lots separately. The object of the Regulation was the protection of the zamindar from the division of any part of his property without his knowledge, but in this case it is clear that he knew of the division all along, and was in fact himself the cause of the property having been so divided." The mere fact, however, of the zamindar accepting rent from the different share-holders of the tenancy in proportion to their respective share, is no evidence of the landlord having consented to the division (*Gour Mohan* v. *Ananda*, 22 W. R., 295). And if the alleged different tenures were indissolubly connected at the time of the original holder, and if the zamindar, in receiving rent from the present holders, had dealt with them only as representatives of the original holder and as payers of component parts of the aggregate rental, he cannot be said to have accepted the division (*Rani Lalan Moni* v. *Sona Moni*, 22 W. R., 34). In *Abhai Charan* v. *Sashi Bhusan Basu* (I. L. R., 16 Cal., 155), it was *held* that *dakhilas*, or rent-receipts, showing that a tenant holds half the land at half the rent of the whole holding do not amount to the written consent required by s. 88 of the Bengal Tenancy Act. But the ruling in this case was distinguished in the Full Bench case of *Piary Mohan Mukherji* v. *Gopal Paik* (2 C. W. N., 375: I. L. R., 25 Cal., 531), in which it was laid down that a receipt for rent granted by the landlord or his agent in the form prescribed by the Bengal Tenancy Act, containing a recital that a tenant's name is registered, in the landlord's *serishta*, as a tenant of a portion of the original holding at a rent which is a portion of the original rent, amounts to a consent in writing by the landlord to a division of the holding and to a distribution of the rent payable in respect thereof within the meaning of

By accepting rent.

s. 88 of this Act; provided that, if the receipt has been granted by an agent, the agent has been duly authorized by the landlord to grant such a receipt. But where a holding is in occupation of several tenants at one entire rental, the fact that the landlord's agent (*tehsildar*) has accepted from the tenants proportionate parts of the rent does not the bind the landlord, in the absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the agent (*Beni Prosad Koeri* v. *Goberdhan Koeri*, 6 C. W. N., 823). Receipts, granted by the landlord's agent to the tenants separately for their proportionate shares of the rent, do not necessarily imply the landlord's recognition of the subdivision of a tenancy (*Beni Prosad Koeri* v. *Ramdahin Pandey*, 1 C. L. J., 90*n*; 10 C. W. N., 216). A receipt for rent granted by a landlord or his agent containing no specification of the original *jama*, no statement of the area, or of the portion of holding separated and separately settled with the tenant, nor of the share separated, nor containing a recital that the tenant is registered in the landlord's *sherista* as a tenant of a portion of the original holding at a rent, which was a portion of the original rent, does not amount to a consent in writing to a subdivision of the holding. An entry in an account, which appears on the face of it to have been written by a servant of a tenant, and exhibited payment of rent made in respect of six different *taluqs* by the tenant to the landlord, and which was signed and receipted by a *sumarnavis* of the said landlord, does not amount to a consent in writing on behalf of the landlord to a division of the tenure or distribution of rent (*Jnanendro Mohon Chowdhuri* v. *Gopal Dass Chowdhuri*, I. L. R., 31 Cal., 1026; 8 C. W. N., 923). So also in *Sri Maharani Beni Pershad Koeri* v. *Ramdahin Pandey* (10 C. W. N., 216), it was *held* that receipts for rent, granted separately by the landlord's *tehsildar* to the tenants of a holding, whose names were also entered in the landlord's *sherista* in the place of that of the tenant who held the tenancy before them, do not amount to a consent in writing, on the part of the landlord, to a subdivision of the tenancy within the meaning of s. 88 of the Bengal Tenancy Act.

Dakhilas.

The question as to whether a *patnidar* has a right of partition as against his superior landlord, and as against the co-sharers of the estate in which his *patni* is situated has been discussed in several cases. In *Mukunda Lall Pal* v. *Lehuraux* (.I L. R., 20 Cal., 379) it was observed that joint possession alone was not a sufficient ground for compelling a partition, and that, in order that persons might be co-parceners and so have a right to partition, not only must they be in joint possession, but that that joint possession must be founded on the same title. It was accordingly *held* that a subordinate tenure-holder had no right of partition as against his superior landlord. This view was, however, dissented from in the full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (I. L. R., 24 Cal., 575). "I am unable," said Banerjee, J., in delivering the judgment of the Court, "to assent to the view, that, as a general proposition of law, there can be no partition between parties, the interest of one of whom is subordinate to that of the other. I think the Court must in each case determine, whether, having regard to the nature of the interests owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and, if it determines the question in the affirmative, the mere fact of the parties owning interests, which are

Partition between Patnidar and Zamindar.

Principle.

not co-ordinate in degree, ought not to be a bar to partition." "The language used in the case of *Mukunda Lall Pal Chowdhury* v. *Lehuraux* (I. L. R., 20 Cal., 379), observed Beverley, J., in the same case, "may not be strictly accurate or very precise, but what was intended to be decided in that case was that mere unity of possession, or, as I should prefer to term it, mere joint possession, is not enough to entitle the persons so in possession to have the land partitioned by *metes and bounds*. The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How 'similar interests' should be defined it may not be easy to say. They should probably be permanent transferable interests." This view of law was accepted in the case of *Bhagwat Sahai* v. *Bepin Behari Mitter* (I. L. R., 37 Cal., P. C., 918) by their Lordships of the Privy Council, who *held* that the right of partition existed when the two parties were in joint possession of land under permanent titles, although those titles might not be identical.

Patnidar entitled to claim partition.

It follows from these observations that a *patnidar* may in such cases demand a partition, provided that the "balance of convenience" is in favour of the arrangement. And this has been held to be the law in several cases. In *Chunder Nath Nandi* v. *Hur Narain Deb* (I. L. R., 7 Cal., 153), the plaintiff was the proprietor of a fractional share of a portion of a revenue-paying estate and had an interest only in one village. He brought a suit for partition, in which he did not seek to have his joint liability for the whole of the Government revenue annulled. *Held* that there was no bar to his obtaining a partition of his share. "The Court", observed the Judges, "might hesitate to allow him a decree for the severance of a portion only of his share, or of his proportionate shares of particular plots; but if he claims to have his whole share divided and disclaims any share in lands not included in the suit, I see no reason why he should not obtain what he claims." In *Mukunda Lall Pal Chowdhury* v. *Lehuraux* (I. L. R., 20 Cal., 379), Norris, J., was of opinion that a partition of a portion could be maintained, if, as regards that portion, the joint owners were different from other joint owners. The plaintiffs in this case were the proprietors of a 12-anna share in a certain tenure known as *taluk* Banga Chandra Dass, and they alleged that they were in possession of the other 4-annas as *dartalukdors*; but it did not appear on the proceedings, to whom the plaintiffs paid rent on account of the 4-anna share. The *taluk* in question consisted of a $7\frac{1}{4}$ annas, or a $\frac{15}{32}$ of the rents, of so much of the lands of the three villages, D, B & T, as appertained to the estate No. 23 on the *tauzi* of the Collectorate of Noakhali. It appears that estates Nos. 23, 24, 25 and 26 represented fractional shares in three parganas comprising some 500 villages. No *bahoara* had been made of these parganas, but, by some private arrangement, apparently, certain lands in a village had been assigned to one estate and certain other lands to another, some lands having been kept common to all the four estates. Thus the estates did not consist of entire villages, but of specific lands in certain villages and a joint interest in other lands kept *ijmali*. There was yet another complication in this intricate and curious system of tenures. It appears there was another permanent tenure called *taluk* Sobharan in this estate No. 23, which *taluk* consisted of lands not only in the three villages in suit but in nine others. A 2-anna share of this *taluk* was in the *khas* possession of the defendant:

Of the other 14-anna share, a 7½ anna share was held under the plaintiff. A suit was brought by the plaintiffs for partition of such of the lands of *taluk* Banga Chandra Dass as appertained to estate No. 23 and were separate from the other estates, to which the other zamindars of estate No. 23 were made parties, and it was *held* that, assuming that the plaintiffs were entitled to partition at all, the suit would lie as regards the lands specified as belonging to estate No. 23 without reference to the lands held in common as belonging to all the four estates. In the case of *Barahi Debi* v. *Deb Kamini Debi* (I. L. R., 20 Cal., 682), Petheram, C. J., and Norris, J., expressed a similar opinion. They said :—"No authority has been cited before us in support of the proposition, that, where a fractional share in a property which forms part of a joint estate has been sold, the purchaser cannot obtain separate possession of the share he has bought, without partitioning the whole joint estate, and I think that to give effect to it, would practically amount to a refusal to allow the purchaser of such a share to obtain separate possession of it at all ; and this would, in my opinion, not only be inequitable, but would greatly diminish, the value of the property held in this way. I think this contention must fail." And in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (I. L. R., 24 Cal., 575 ; 1 C. W. N., 406), where the plaintiff, who was the proprietor of an entire estate paying an annual revenue to Government, sued to have his ten-anna share of the estate partitioned by *metes and bounds* from the other undivided six annas (which his father had given in *patni* lease to the defendant's predecessors in title), on the ground that, although the estate was held in *ijmali* and he and the defendant collected separately from their tenants their respective shares of the rent, difficulty and inconvenience had arisen in the management of the property, and where there was no prayer that the land of the entire estate should be relieved of the liability as before to pay the entire amount of the Government revenue payable in respect of it, it was *held* by the Full Bench that the plaintiff was entitled to a decree for partition. So also in the case of *Bhagwat Sahai* v. *Bepin Behari Mitter* (I. L. R., 37 Cal., P. C., 918), where the appellants, plaintiffs in a suit for partition, were proprietors of a *mokurrari* interest in the property a partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zamindari interest in the same property, and where the *mokurrari* lease was, in certain contingencies, liable to forfeiture, and the High Court had held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled, it was *held* by the Judicial Committee of the Privy Council (reversing the decision) that the distinction drawn by the High Court could not be supported, and that the appellants' title being a permanent one, though liable to forfeiture in events which had not occurred, the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances. A contrary view was taken in the case of *Parbati Charan Deb* v. *Ainuddin* (I. L. R., 7 Cal., 577), where the owner of a twelve-anna share in a joint zamindari consisting of 100 *drones* of land granted to the plaintiff a *mokurrari* lease of his share in a small portion of land (2 *drones*), while the owners of the remaining four-anna share granted a *patni* of the whole of their share to the defendants, and the plaintiff brought a suit

against the defendants for a partition of the small plot of land, and it was *held* that such a suit would not lie because the zamindars had not been made parties and also because a partition could not be enforced of a part of the estate held by the defendants, who were entitled, by right of their *patni*, to an undivided four-anna share in the whole estate and who, if the plaintiff's claim was allowed, might, in respect of the same estate, be subjected to many claims for partition at the suit of persons in plaintiff's position. This ruling was, however, referred to in the case of *Radha Kanta Shaha* v. *Bipro Dass Roy* (1 C. L. J., 40), and the Judges observed :—"So far as we understand the judgment, the question (in that case) was one of convenience and inconvenience ; and it was not laid down, as a matter of law, that a partition of a portion of a revenue-paying estate, when that portion is capable of partition without much inconvenience to other sharers, is absolutely barred by law." In *Radha Kanta Shaha* v. *Bipro Dass Roy* (1 C. L. J., 40), where the estate consisted of three different villages, in one of which the plaintiff had a *kaemi mourasi miras* right to certain shares and no interest in the other two, and where the plaintiff asked for a partition of the village in which he was interested, making the entire body of proprietors parties to the suit, the Judges discussed all the authorities cited above and *held* that the rules deducible from them were :

Rules deducible from the authorities.

(1) *first*, that the plaintiff, notwithstanding that he was a subordinate tenure-holder of a fraction of an estate, was entitled to partition as against the proprietors of other shares ; and

(2) *secondly*, that, notwithstanding that he held a share of one village out of many in the estate, he was entitled to have his share separately carved out.

They observed, however, that in all such cases the question of convenience and inconvenience must be taken into consideration. The same view was taken in the case of *Uma Sundari Debi* v. *Benode Lall Pakrashi* where it was ruled that, in the absence of any inconvenience to other co-sharers, a *patnidar*, whose right extended over only a fractional share of one of many *mouzahs* in the zamindari, was entitled to maintain a suit for partition. "It is settled law now," the Judges said, "that a *patnidar* of a fractional share can partition any property held jointly by himself and some of the defendants, although the defendants may be jointly interested with or without other persons in the remaining portion of the estate. See *Radha Kanta Shaha* v. *Bipro Dass Roy* (1 C. L. J., 40). It was also held in the case of *Barahi Debi* v. *Debkamini Debi* (I. L. R., 20 Cal., 682), that there was no objection to a decree being made for the separation of a share, purchased by a stranger, from the other joint owners without partitioning the whole joint estate. The plaintiff is, therefore, entitled to ask for partition of her *patni* share. It is idle for the defendant-respondants to urge that in this suit we should order the partition of at least four villages, with three of which the plaintiff has nothing whatever to do." In *Upendro Chandra Singha Roy* v. *Mahomed Faiz* (12 C. W. N., 670), again, it was *held* that a person holding a permanent interest, though an interest of an inferior grade, might bring a suit for partition as against persons who hold interests of a superior grade.

Consequently, a *patnidar* may bring a suit for partition against his *co-patnidars* or against *darpatnidars* under his *co-patnidars*; in the latter case the *co-patnidars* must be made parties (*Ibid*). The *darpatnidars* are not, however, necessary parties in such a suit. Where it was found that the addition of *dar-talukdars* as parties would make the suit highly complicated, it was *held* that such *dar-talukdars* should be allowed to watch the partition-proceedings, but need not be made parties (*Ibid*).

Dar-patnidars need not be made parties.

Merger.—See s. 111, clause (*d*), of the Transfer of Property Act. Before the passing of the Transfer of Property Act, the doctrine of "Merger,"—the extinction of the inferior right of a *patnidar* in the higher right of a zamindar—did not apply in this country. "My own impression is," observed Peacock, C. J., in the case of *Woomesh Chunder* v. *Rajnarain* (10 W. R., 15), "that the doctrine of merger does not apply to lands in the moffusil in this country.....I believe it is the practice in this country for zamindars to purchase and keep on foot *patni taluks* without the necessity of adopting the practice, which is followed in England, of purchasing such *taluks* in the name of a trustee to prevent the merger of them." A similar view was taken in the case of *Jibanti Nath Khan* v. *Gokul Chandra Chowdhuri* (I. L. R., 19 Cal., 760), where it was *held* that there is no merger in the case of a *patni* interest coming into the same hands as the zamindari interest. In the recent case of *Promotho Nath Mitter and another* v. *Kali Prosunno Chowdhury* (I. L. R., 28 Cal., 744), however, it was decided that a *patni* interest created *after* the passing of the Transfer of Property Act (Act IV of 1882), is determined on a purchase of the same by the zamindar, even at a sale held in execution of a decree. In distinguishing this case from *Jibanti Nath Khan* v. *Gokul Chundra Chowdhuri*, referred to above, Banerjee, J., observed:—"That case (*i.e.*, *Jibanti Nath Khan* v. *Gokul Chundra Chowdhury*) was decided without any reference to the Transfer of Property Act, and was a case to which the provisions of the Transfer of Property Act were inapplicable by reason of cl. (2) of s. 2 of that Act, the *patni* lease in that case having been granted and the *patni* having been created before the Transfer of Property Act came into operation." A zamindar purchasing a *patni* under him can, therefore, deal with his two rights as one now. Similarly, when the *patnidar* of a *mahal*, which formed a portion of a zamindari, purchased the zamindari rights in the *mahal* and from the date of his purchase paid no rent as *patnidar*, it was *held* that he could not set up his title as *patnidar* against his zamindari co-sharers in a suit brought by them for contribution (*Prosunno* v. *Jogut*, 3 C. L. R., 159). The same view was taken by the Board of Revenue in a case where a *patni taluk* belonging to a trust-estate was sold for arrears of rent, and was purchased on behalf of the estate. Subsequent to the sale, the *patnidar* paid in the arrears due from him as well as the costs of bringing the *patni* to sale, and asked that the *patni* might be restored to him. The Collector and the Commissioner recommended that the sale might be considered null and void and the *patnidar* remain in possession as before. The Legal Remembrancer, who was consulted, expressed his opinion that the *patni taluk* had merged in the proprietary right by the purchase on behalf of the estate, and that the old *patnidar* could not be re-instated without a fresh *patni* lease. (Board's Miscellaneous Proceedings of 17th August, 1889, No. 151, Collection 7, File 282 of 1889).

The doctrine did not apply before the passing of the Transfer of Property Act.

It applies now.

Board's Proceedings.

Patnidar's right of underletting:—See s. 4 (post). It is not competent to a superior landlord like a *patnidar* to grant a lease of land of which he is not in possession, and, by such a grant, to give opportunity to a party to raise the question of his title, and have it indirectly settled. In order to enable a lessee to defend any action, his grantor must be in possession at the time of the grant, otherwise a suit for possession at the tenant's instance alone cannot be supported (*Dinomonee Banerjee* v. *Gyrutullah Khan*, 2 W. R., 138). In *Prankristo De* v. *Bissumbar Sen* (11 W. R., 80), however, it was held otherwise. So also in *Tara Sundari Debya & others* v. *Shama Sundari Debya & others* (4 W. R., 58), a *patni* estate was the inheritance of 5 brothers, two of whom appropriated the whole of it, and the plaintiff, as the holder of a *kaimi pattah* from the *darpatnidar* of the 3 ousted brothers, sued to obtain possession of the share of the estate to which he considered that he has entitled. The Lower Court decided that such a suit would not lie, as the suit must be preferred by the ousted brothers themselves. The High Court, however, held that the Lower Court was altogether wrong, and that the plaintiff's claim must be tried and adjudicated upon. "In fact," observed that Court, "the plaintiff, under the circumstances, is the sole person who could bring a suit to recover the portion of the estate covered by the plaintiff's *pottah*, as he represents the original owners, the three brothers." In *Loke Nath Ghose* v. *Jagabandhu Roy* (I. L. R., 1 Cal., 297), plaintiff sued for a declaration of his *darpatni* and *charpatni* rights in certain estates and for possession. He alleged that he obtained in 1278 (1870) a *darpatni* of an 8-anna share in the properties from Girish Narain Roy & Mohendra Narain Roy, the heirs of Boykunt Nath Roy, the *patnidar* of the said share; that he afterwards granted a *sepatni* of one of the estates to one Kishto Bulluv Roy and again took from the latter a *charpatni*; and that, on attempting to take possession of the estates, he was opposed by the defendants. It appeared that the plaintiff had paid the consideration for the *darpatni*, but it was admitted on his behalf that Girish Narain Roy & Mohendra Narain Roy were not in possession when they granted the *darpatni*. *Held* (1) that a transfer of property of which the transferor is not in possession at the time of the transfer is not *ipso facto* void; (2) that, where a *patnidar*, while out of possession of the *patni* estate, granted a *darpatni* thereof, the *darpatnidar's* suit against persons, who were in possession of the estate, to recover possession would lie, it appearing that the plaintiff had paid an adequate consideration for the *darpatni*, and (3) that the *darpatni pottah* was not evidence of a contract to be performed in future on the happening of a certain contingency, but, that if it was so, the plaintiff had done all that he was bound to do to entitle him to specific performance of the agreement by the *patnidar*.

Temporary leases.

Right to Minerals.—Temporary lessees have no right to the minerals underlying their land, and can only work mines, quarries, or pits, which are open when they come into possession (*Prince Mahomed Bakhtyar Shah* v. *Rani Dhojamoni*, 2 C. L. J., 20; In re *Purmanandas Jeewandas*, I. L. R., 7 Bom., 109). This view was confirmed by their Lordships of the Privy Council in *Tituram Mukherjee* v. *Cohen* (I. L. R., 33 Cal., 203; 1 C. L. J., 517; 2 C. L. J., 406; 9 C. W. N., 1073).

Permanent leases.

As regards permanent lessees, it is well established that a contract to sell or grant a lease of land will generally include

the entire solum from the surface down to the centre of the earth, and will, therefore, include the mines, quarries and minerals beneath or within it: see the observations of Sir John Romilly, M. R., in *Kerr* v. *Pawson* (25 Beapv., 394, 406), and those of Sir Richard Kindersly, V. C., in *Williamson* v. *Wooton* (3 Drew., 210, 213). Similarly a conveyance of land is, *primâ facie*, a conveyance of the entire solum from the surface down to the centre: see the observations in *Harris* v. *Ryling* (5 M. &. W., 60; 52 R. R., 632), *Spooner* v. *Green* (L. R., 9 Exch., 99, 107), and *Earl of Jersey* v. *Gardians of poor* (22 Q. B. D., 555, 558). In the last case mentioned, Lord Esher observed that, if the conveyance was of all the lands and if there was no reservation, that would carry all the minerals within the ambit. Indeed, so strong is the presumption that a conveyance of land carries with it the minerals, that it has been held that a purchaser need not disclose the existence of a mine, unknown to the vendor, which increases the value of the property itself: see *Fox* v. *Mackreth* (2 R. R., 55). "The principle," observed Mukherjee, J. in *Megh Lall Pandey* v. *Raj Kumar Thakur* (I. L. R., 34 Cal., 358), "upon which this presumption is raised appears to be that minerals in place or undisturbed in the position in which they have been deposited by the agencies of nature, are a part of the land, and belong to the owner of the soil; although, therefore, minerals in the ground are capable of severance, or separation of ownership from the soil, and, when so severed, are independently and separately inheritable and capable of transfer, yet when there has not been such separation and a reservation, they will pass, if all the rights of the owner are transferred: see *Adam* v. *Briggs Iron Company* (7 Cushing, 361), in which it was held that *primâ facie* the owner of freehold lands is entitled to all the minerals and strata of coal, clay or ore, lime, marble and the like, not as a separate estate, but as a part of the fee and inheritance, and they will pass by descent or conveyance without special designation. The general rule may, therefore, be taken to be that when mines or minerals form a part of the whole unsevered inheritance, an owner in fee-simple possesses, in all freehold lands, an unrestricted right to work the mines in his estate, and his conveyance, in the absence of an indication to the contrary, grants all mines and minerals therein. In other words, a conveyance of land, in the absence of an express limitation, passes the entire estate, if the grantor is seized of the entire estate, and carries with it all the grantor's right and title to an interest in the minerals, unless they are expressly reserved by the terms of the instrument or have been previously granted." The same view has been taken by Mr. Justice Saroda Chandra Mittra in his book on the "Landlaws of Bengal" (see pages 393-396). In *Hari Narain Singh Deo* v. *Sriram Chakravarti* (I. L. R., 33 Cal., 54; 37 Cal., 723; 3 C. J. L., 59), however, their Lordships of the Privy Council doubted the correctness of this view. which, in their opinion, seemed practically to ignore the distinction between the mere tenure-holder and the zamindar. The question for decision in this case was, whether certain Gosswamis, the *shebaits* of an idol and lessees of a village in the zamindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any right in the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them.

English Law.

Principle.

General rule to be followed.

There was no document in evidence defining the terms of the lease to the Gosswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Gosswamis were put in, in one of which they were described as cultivators and in the other as "*britti-holders.*" There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Gosswamis or to any other person. Both the Courts in India found that the village was a *mal* (rent-paying) village of the zamindari of the Rajah, and that no prescriptive right had been proved by the respondents to any underground rights in the village. The High Court decided that the zamindar had created a permanent tenure of an agricultural character, and that the tenure-holder would possess all underground rights in the absence of an express reservation by the zamindar. The Judicial Committee of the Privy Council, however, reversed this decision, and *held* that the title of the zamindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appertaining thereto in the absence of any evidence that he had parted with them. It is doubtful if this decision of the Judicial Committee is in consonance with English legal ideas, but it is certainly opposed to the popular view in this country which the judgment of the High Court reflected. If it be not taken to be strictly limited to the facts of the particular case, it will have very serious consequences in the existing mining leases, many of which are derived from tenure-holders. This decision was, however, followed by the High Court in a later case (*Jyoti Prosad Singh* v. *Lachipur Coal Company*, I. L. R., 38 Cal., 845), where it was *held* that there is no difference in principle between a lessee for years and a lessee in perpetuity, when nothing is known or nothing can be inferred about the intention of the parties at the time of the inception of the lease, and that the landlord continues to have a reversion in mines discovered after the grant of such a lease.

Language and intent of parties must be taken into account.

To ascertain the rights of the grantee, the language of the instrument and the intent of the parties as well as the estate held by the grantor must be taken into consideration. Where, therefore, a *mokurrari* lease of a whole *mouza* "*mai hak hakuk*" was granted, it was *held* that the grant created a permanent lease without any reservation, and that it conveyed to the lessee all the lessor's rights in the land, including the right to work minerals (*Megh Lall Pandey* v. *Rajkumar Thakur*, I. L. R., 34 Cal., 358). Where, however, in a *patni* lease, the coal and mineral rights and the surface of such of the lands as are coal-bearing are excepted from the grant, the *patnidar* is bound by the reservation (*Rameshwar Malia* v. *Ram Nath Bhattacharjee*, I. L. R., 33 Cal., 462). In such a case the lessor impliedly reserves to himself as a necessary incident the right to dig for, and win, them. The reservation of mineral rights apart from the surface rights must be taken to carry as an incident to it the power not only to go upon the land and work the minerals known to be underground, but to go on the land to conduct the ordinary preliminary operations by boring or otherwise to ascertain, when it is not known, if there are minerals underground (*Ibid*). So also in *Gandoo Mahata* v. *Nilmonee Singh Deo* (1 C. L. J., 526), it was *held* that when a grantor of *patni* lease has reserved to himself the right to underground coal and limestone, he is entitled to ingress and egress upon the *patni mahal* for the purpose of reasonably working the mineral rights which are reserved to him by the *kabuliyat*, but he is bound

to do no more damage to the surface than is absolutely necessary, and protect the lessee's right to support in case any excavations are made, and compensate him for any injury to the surface of the soil. Observe that a reservation of minerals in a *patni* lease does not necessarily include every substance which can be got from underneath the surface of the earth for the purpose of profit. The words 'mines' and 'minerals' in any particular grant must be given the meaning which, judged from the whole of the deed, the parties may be taken to have intended (*Gandoo Mahata* v. *Nilmonee Singh Deo*, 1 C. L. J., 526).

Application of clause (*o*), section 108 of the Transfer of Property Act.

In the two cases cited above (*Megh Lall Pandey* v. *Raj Kumar Thakur and Sriram Chandra Chakravarti* v. *Hari Narain Singh Deo*), the question as to whether or not the principle underlying section 108, clause (*o*) of the Transfer of Property Act applied to permanent alienations without reservation was considered. In the former, Mr. Justice Mukherjee held that it did not, and observed that the rule embodied in that section, *viz.*, that the lessee must not work mines and quarries not open when the lease was granted, applied, as was obvious from the opening words of the section, only in the absence of a contract to the contrary. In the latter case the Judges of the High Court came to the same conclusion, though on different grounds. "The provisions of clause (*o*) of section 108 of the Transfer of Property Act," it was said in that case, "cannot even by analogy be safely applied to these tenures, for that clause prohibits a lessee from pulling down buildings or felling timber, and yet it is well-known that a permanent tenure-holder is not ordinarily restricted in those ways (see section 10 of the Bengal Tenancy Act). Moreover, clause (*p*) of section 108 prohibits a lessee from erecting any permanent structure without the landlord's consent; and yet it is a common place in the land-law of this country that permanent tenure-holders can ordinarily build such structures on their lands without the zamindar's consent. It is only when there is an express stipulation depriving a permanent tenure-holder of such rights, that he is debarred from exercising them. It is obvious, therefore, that tenure-holders have rights which go very far beyond what the Transfer of Property Act allows to ordinary lessees. The inference would rather be that such tenure-holders possess, in addition to those rights which have been noticed, the right of working mines and quarries also."

Section 65 of the Tenancy Act applies to patni tenures.

Object of the provision.

Section 65 of the Tenancy Act.

Patni tenures liable to sale for arrears of rent.—The same principle has been laid down in section 65 of the Bengal Tenancy Act which applies to *patni* tenures (*Piari Mohon Mukherjee* v. *Ram Chandra Bosu*, 6 C. W. N., lxxviii). The object of this provision in both the cases is that all permanent tenures are hypothecated to the landlord for rent; so that the tenant cannot, by disposing of the tenure to a third party, deprive the landlord of his lien upon it. Section 65 of the Tenancy Act provides:—"Wherever a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

It is clear from this section that, whenever a tenure or a holding is sold otherwise than in execution of a decree for arrears of rent, it is sold subject to the lien of the landlord on it for any rent due at the time of the sale. The

landlord is, therefore, in the position of a first mortgagee, as far as the rent is concerned (*Tarini Prosad Rai* v. *Narain Kumari Debi*, I. L. R., 17 Cal., 301). So, when a tenure is sold in execution of a mortgage-decree, the purchaser takes it subject to the liability for the rent which had accrued due in respect thereof at the time of the purchase. (*Moharani Dasya* v. *Horendro Lall Rai*, 1 C. W. N., 458). And if he pays the amount to save the tenure from sale, he has no right of recourse against the former tenant (*Ibid*). The case is, however, different when a tenure is sold in execution of a decree for its own arrears of rent: It passes in that case to the purchaser free from all liability for previous years. "Rent," as observed the Judges, in *Faiz Rahaman* v. *Ram Sukh Bajpai* (I. L. R., 21 Cal., 169), "falling due during the time that a tenure belongs to any particular tenure-holder is a first charge on the tenure only so long as it is his, and has not been sold for arrears of rent. And this, we think, is made clear beyond doubt by clause (*c*) of section 169, which enacts that, if any surplus remains of the proceeds realized by the sale of a tenure in execution of a decree for arrears of rent after satisfying that decree, any rent falling due between the date of the suit in which the decree was passed and the date of sale shall be paid therefrom to the decree-holder. This provision of the law evidently shows that the Legislature intended that the charge in respect of any rent falling due between the date of the suit and the date of sale in satisfaction of the decree passed therein, shall be transferred from the tenure to its sale-proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all liability created upon it by the default of the previous holder." So, when a landlord himself sold an occupancy-holding in execution of a money-decree, he could not again sell it in execution of a decree for rent due for past years. A purchaser at such a sale acquired no right in the holding (*Ram Saran Poddar* v. *Mahomed Latif*, 3 C. W. N., 62). Section 65 only intends what is implicitly laid down in subsequent sections of the Act, that is, those in Chapter XIV, namely, that the charge should be enforced by the sale of the tenure or the holding free of encumbrances, and, if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure, the charge created by section 65 cannot be enforced in any other way. (*Soshi Bhusan Guha* v. *Gogon Chandra Shaha*, I. L. R., 22 Cal., 364). So, when the purchaser of a *patni taluk* paid off a decree for rent obtained against the old tenant for a period anterior to that of the rent-decree in execution of which the tenure was sold, it was *held* that the purchaser was not entitled to contribution from the old tenant against whom the rent-decree was obtained (*Piari Mohan Mukherjee* v. *Sriram Chandra*, 6 C. W. N., 794).

When tenures sold otherwise than for arrears of rent.

When sold for arrears of rent.

Before the passing of the Bengal Tenancy Act of 1885, the only remedy open to the landlord for enforcing his rent-decree was in the first instance to sell it up (*Deanatullah* v. *Nazar Ali Khan*, 1 B. L. R., A. C., 216; 10 W. R., 341; *Joki Lall* v. *Narsing Narain Singh*, 4 W. R., Act X, 5; *Harish Chandra Rai* v. *The Collector of Jessore*, I. L. R., 3 Cal., 712; *Lalit Mohan Roy* v. *Benodai Debee*, I. L. R., 14 Cal., 14). And he was debarred from proceeding in execution against any other immovable property of the tenant until he could show that his decree could not be satisfied by attaching the person and movable property of the judgment-debtor. He could not moreover proceed against the person and property of the judg-

Remedies open to the landlord for execution of rent-decrees.

ment-debtor simultaneously. The law has been changed by section 65 of the present Tenancy Act which has been construed to mean that the landlord, in the case of a saleable tenure, has a double remedy: He may either bring a suit to enforce the statutory charge against the tenure, or he may elect to proceed as an ordinary creditor (*Tarini Prosad Roy* v. *Narayan Kumari Debi*, I. L. R., 17 Cal., 301). The plaintiff in this case, having obtained a decree against his tenant for the rent of a *patni taluk*, attached, in execution of that decree, properties belonging to the judgment-debtor other than the *patni taluk* in question. The judgment-debtor put in an objection that, under the terms of the *patni kabulyat* and the provisions of the law, the decree-holder was bound to proceed, in the first instance, against the *patni* tenure itself, and then against a certain sum given in deposit by the judgment-debtor. The objection was disallowed, and Petheram, C. J., observed as follows:—"The only section which can be relied upon by the defendant, the tenant, is section 65 of the Bengal Tenancy Act. This section provides that a tenant under these circumstances shall not be liable to ejectment for arrears, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon. This section, so far as I can see, creates a first charge upon the tenure for the rent of it, and puts the landlord in the position of a first mortgagee, so far as the rent is concerned, but the tenant remains personally liable for the rent. So that the landlord's position is this: he has a mortgage or charge upon the tenure for the rent, and he has a remedy against the tenant personally for the debt to him. That being the case, he has a right to avail himself of either of his remedies. He may, if he chooses, bring an action in which he claims to establish his lien upon the tenure to bring that tenure to sale, notwithstanding any other charge which may have been made upon it, and that whether the tenant had any other property and whether some one else had a charge by way of contractual mortgage upon the tenure. But if he thinks fit, he need not follow that course. He may bring an action to recover the debt the tenant owes him in the same way as he might if he were a mortgagee in a case where there was a personal covenant in the mortgage-deed, giving the go-by to the mortgage and getting a personal decree against the debtor for the payment of the money. Having elected that course, he appears to be in the position of an ordinary creditor able to realize his debt by the ordinary forms of attachment and sale of any property which the debtor had, subject to any charge which other persons may have upon it." A landlord who obtains a decree for rent is entitled, if he pleases, in the first instance to attach the person of his judgment-debtor. He is not obliged in the first instance to endeavour to execute his decree by putting up for sale the tenure the rent in respect of which is in arrear, and for which he has obtained a decree. (*Fatik Chandra De* v. *Foley*, I. L. R., 15 Cal., 492; *Bhabani Charan Datta* v. *Protap Chandra Ghose*, 8 C. W. N., 575). Notwithstanding a stipulation in a lease that, on default of payment of rent, the landlord shall be entitled to realize the same by auction-sale of the tenure, the tenant is also personally liable for the rent (*Sourendro Mohon Tagore* v. *Sornomoyi*, I. L. R., 26 Cal., 103; 3 C. W. N., 575). A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarrari* tenure in a suit brought against all the tenants is entitled, under section 65 of the Tenancy Act, to sell the tenure in

execution of the decree, although he recognised the fact that the tenants had subdivided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent. (*Surbo Lall* v. *J. M. Wilson*, I. L. R., 32 Cal., 680). A decree, however, for the consolidated rent of three tenures cannot be executed by the sale of the tenures. This would be making each tenure liable for the rent of the other tenures. (*Mohendro Ram Tewari* v. *Ram Krishna Rai*, 10 C. W. N., cclii; *Hridoy Nath Dass* v. *Krishna Prosad Sarkar*, 11 C. W. N., 497; *Bipra Dass Dey* v. *Raja Ram Bandopadhya*, 13 C. W. N., 650).

A decree by co-sharer landlord is not a decree for rent.

Rights of co-sharer landlords.—Section 65 of the Tenancy Act has been interpreted as presupposing a decree made in a suit in which all the landlord co-sharers are plaintiffs and not merely some of them. (*Narainuddin* v. *Srimanta Ghosh*, I. L. R., 29 Cal., 219). A decree obtained by a co-sharer landlord for his share of the rent is not a decree for rent. Where one of several co-sharers in a zamindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country and independently of the Bengal Tenancy Act (*Beni Madhab Rai* v. *Jood Ali Sirkar*, I. L. R., 17 Cal., 390). A fractional co-sharer who has obtained a decree for his share of the rent cannot, therefore, sell the tenure or holding, but only the right, title and interest of his judgment-debtor in it in execution of his decree, and it is clear that, were he to be allowed to do otherwise, it would be unfair to his other co-sharers, who had not sued for their shares of the rent. A co-sharer landlord has also no right under section 65 of the Tenancy Act to proceed against a share of the holding, when the original holding has not been subdivided (*Hari Charan Basu* v. *Ranjit Singh*, 1 C. W. N., 521; I. L. R., 25 Cal., 917). The Bengal Tenancy Act does not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords, who has obtained a decree for the share of the rent separately due to him; such a sale must be under the provisions of the Civil Procedure Code and would not carry with it the special incidents attaching to a sale under the Bengal Tenancy Act (*Saudagar Sirkar* v. *Krishna Chandra Nath*, I. L. R., 26 Cal., 937; 3 C. W. N., 742). In a suit for rent for four years, it appeared that, for the first two years of the claim, the plaintiff represented the entire body of landlords, and that for the last two years only fractional landlords. The High Court *held* that the decree in such a case was not a rent-decree under the provisions of section 65 of the Bengal Tenancy Act, which presupposes that the decree should be in a suit in which all the landlord co-sharers are plaintiffs and not merely some of them (*Shaik Naimuddin* v. *Girish Chandra Ghose*, 6 C. W. N., 124). The sale of a tenure in execution of a decree for rent obtained by certain persons who did not constitute the entire body of landlords at the date of the suit and of the decree, and who were not the entire body of landlords at the date at which part of the claim for which the rent-suit was brought accrued due, would not pass the entire tenure but would merely pass the right, title and interest of the judgment-debtors in the tenure at the date of the sale (*Ibid*). In one case, where one individual held a *patni* by paying rent in equal shares to two owners of a zamindari, it was *held* that the division is the joint act of the *patnidar* and the zamindar, and is as if each of the zamindars had granted to the same person his share in *patni* (*Monmotho Nath Dey* v. *G. Glascott*,

Only the right, title and interest passes.

20 W. R., 275). "It appears to us," observed the Judges in this case, "that there are two points of view in which this question (*i.e.*, the question of divisibility of a *patni*) may be regarded—one as it relates to a sale which creates, or purports to create, a division of a *patni* tenure, and the other as it relates to a sale which merely recognizes and follows existing facts, a division of the tenure having already taken place. It is stated before us to-day that, in regard to the particular *patni* tenure before us, a division of that which was originally a *patni* of eight annas had long before taken place with the sanction of the zamindars,—and that they enjoyed severally their two distinct *patnis* of four annas each, and accordingly the two portions were sold, one after the other, on the same day. Now, it seems that the *patnidar* was one individual who held his *patni* by paying rent in equal shares of four annas each to the two owners of the zamindari. In this manner the division of the *patni* was the joint act of the *patnidar* and the zamindar, and was as if each of the zamindars had granted to the same person his four annas share in the *patni*." In *Asubali Pramanik* v. *Bisseshuri* (8 C. L. J., 554), where one of the co-sharers in the zamindari, who had a five annas interest, brought a suit for his share of the rent against the registered *patnidar*, and obtained a decree in execution of which he sold the five annas interest, and where it was *held* that the effect of the sale was precisely the same as that of sale under a money-decree, *viz.*, that only the right, title and interest of the judgment-debtor at the time of attachment passed, this case was explained, and the Judges observed:—"It has been argued before us upon the authority of the case of *Monmotho Nath Dey* v. *G. Glascott* (20 W. R., 275), that the effect of this sale is identical with the effect of a sale in execution of a decree for arrears of rent. The facts of the case of *Monmotho Nath Dey* v. *G. Glascott* are very peculiar, and what the learned Judges substantially found in that case was that there had been a subdivision of a *patni*, that in fact each co-sharer in the zamindari practically had under him a separate *patni*. There is nothing to show that in the present case, the five annas co-sharer who instituted the suit for rent had a separate *patni* under him. We do not think there is any authority in support of the proposition that, merely because a co-sharer landlord collects his share of the rent separately from the tenant, that alone constitutes a separate tenancy under him." But a co-sharer who sues for the whole rent and makes his co-sharers defendants is entitled to bring the tenure to sale under the Bengal Tenancy Act (*Pramada Nath Roy* v. *Romoni Kanta Roy*, I. L. R., 35 Cal., 331; 11 C. W. N., 983; 7 C. L. J., 139 (P. C.); *Soshi Kumar* v. *Sitanath*, I. L. R., 35 Cal., 744). In the first mentioned case the appellant, a co-sharer in a zamindari interest, in consequence of the *patni* rent falling into arrear so far as the share which should have come to him was concerned, brought a suit making the *patnidars* defendants and joining as co-defendants his co-sharers in the zamindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure and for that purpose to bring to sale the tenure itself. The plaint also asked in the alternative for a decree for appellant's shares of the rent. *Held* that the appellant was competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit. *Held*, also, that the law applicable to the present case must apparently be that, by the express terms of the Bengal

But if co-sharers made defendants, tenure liable to sale.

Tenancy Act, in the event of the rent being unpaid, the co-owners of the zamindari interest were entitled, by suit under that Act, to bring a *patni* to sale, with the consequence prescribed by that Act, and it was a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, could bring them into the suit as defendants, and sue for the whole rent of the tenure, unless there was something to exclude the case from the operation of those rules. It was contended that the case was excluded from the operation of those general rules on the ground that, by express or implied agreement between the zamindars and the *patnidars*, the shares in the *patni* rent of the several zamindars were to be paid, and so far as they were paid at all, were in fact paid separately. *Held* that the right to bring the tenure to sale for arrears of rent remained in tact, and also the right of one of the co-sharers to sue, making his co-sharers defendants when they would not join as plaintiffs.

Relinquishment and surrender.—A *patni* cannot be relinquished without the consent of the landlord, and a *patnidar* cannot put an end to the contract at his own option. So in *Hira Lall Pal* v. *Nilmoni Pal & others* (20 W. R., 383), it was *held* that it was not open to a *patnidar* of his own choice to throw up the *patni*, and, by so doing, escape his liability to pay rent. "We do not say," remarked Jackson, J., "that the contract (between the zamindar and his *patnidar*) is indissoluble, because many circumstances might arise in which the interference of a Court of Justice might fairly be invoked to put an end to it; but the dissolution of such a contract must, we think, be an act of the Court and the result of a proper enquiry, and cannot be taken by the *patnidar* alone, and pleaded in answer to a suit for rent." So also in *Govinda Nath Shaha Chowdhury* v. *Surja Kanta Lahiri* (I. L. R., 26 Cal., 460), the Court observed:—"Where a zamindar finds that the *patnidar* or other permanent tenant, after having allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than 12 years, offers to relinquish it, the zamindar can always refuse to accept the relinquishment; and if the rent remains unpaid, he can bring the tenure to sale for arrears of rent, and the purchaser at such a sale would be entitled to avoid any incumbrance created by the defaulting *patnidar* and would not be bound by any adverse possession held against the latter." *A* obtained a *patni pattah* in the year 1252 of the whole 16 as. of a zamindari from *B*, *C* and *D*. Subsequently *E* obtained a decree for a 4 annas share of the zamindari and afterwards leased her 4 annas share to *D*, one of the grantors of the *patni pattah* to *A*. *D* then sued the raiyats for rent, not as zamindar, but as *ijaradar* of *E's* share in the *patni*. *Held* that the *patnidar* not having been a party to the suit by *E* and this not being a suit by *D* as *patnidar*, but as *ijaradar* of the share obtained by *E* under her decree, *D* was not entitled to get rid of the *patni*, *qua* this 4 annas share, by a suit in this shape, and that the *patni* must be upheld until set aside by a regular suit. (*Raj Chandra Roy Chowdhury and others* v. *Annoda Prasad Mukherjee & another*, 17 W. R., 221). But if a permanent tenure is relinquished, and the zamindar accepts the relinquishment, neither the tenure-holder nor any one under him can reclaim it. A voluntary abandonment for a long period

without inevitable force major or other cause beyond the power of the holder must be considered to be equal to an express relinquishment (*Chunder Monee* v. *Shumbhoo*, Spl. W. R., 270).

Inferior tenures under similar title-deeds confer similar interest to that provided for *patni taluks* in section 3.

4. If the holder of a *patni taluq* shall have underlet in such manner as to have conveyed a similar interest to that enjoyed by himself, as explained in the preamble to this Regulation, the holder of such a tenure shall be deemed to have acquired all the rights and immunities declared in the preceding section to attach to *patni taluqs*, in so far as concerns the grantor of such under-tenure.

The same construction shall also hold in the case of *patni taluqs* of the third or fourth degree.

Notes.

Mere possession for 12 years not sufficient.

Creation of Darpatni.—See notes under the heading "Creation of Patni Tenures" at p. 5. The mere fact of a person having been in possession of lands for 12 years paying rent is not sufficient to establish a *darpatni* tenure, although it may be that the defendants upon this ground may claim some right in the nature of a right of occupancy, or they may urge that they cannot be summarily ejected in a suit of this character. (*Ram Kulp Bhattacharjee* v. *Tara Chand*, 11 W. R., 358). Where a *patni* is found to be *benami*, a *bonâ fide darpatni* does not necessarily lapse. (*Dwarka Nath* v. *Srigopal*, 5 W. R., 240). "We think," observed the Judges in this case, "the plaintiff could have successfully pleaded his right to possession against the purchaser of the rights and interests of the defendants, the ex-zamindar and *patnidar*, as represented by the purchasers of the decree, by urging the priority of his *darpatni* right. The plaintiff could have shown that, at the direction of the ex-proprietor and with the knowledge of the *benami* nature of the *patni* lease (albeit, perhaps, without full knowledge of the reason of the *benami*) and being assured either by the words or the conduct of the said ex-zamindar that the *patni* was a rightful one, he had paid a valuable consideration for his *darpatni*. It does not follow by any law and precedent that, because the higher tenure is found to be a *benami* transaction of the debtor, the *darpatni* tenure, if the plaintiff acquired it *bonâ fide*, is to be lapsed."

Where higher tenures found benami *darpatni* does not necessarily lapse.

Transfer of Darpatni tenures.—See notes under the heading "Transfer of Patni Tenures" at p. 53. Observe that the provisions of section 13 of the Bengal Tenancy Act apply to the sales of *darpatni* taluks in execution of decrees, as the provisions of section 195, clause (*e*), apply only to enactments relating to *patnis* properly and strictly so called, and must be treated as excluding those which relate to tenures, which, though resembling *patnis* as *darpatnis*, &c., are not strictly *patnis*, not possessing all the qualities of them (*Mahomed Abbas Mondal* v. *Brojo Sundari Debya*, I. L. R., 18 Cal., 360). In *Lakhi Narain Mitter & another* v. *Sita Nath Ghose & others* (6 W. R., Act X, 8), the plaintiff, a *patnidar*, sued the defendant, a registered *darpatnidar*, for rent. The latter asserted that he had sold his *darpatni* to one Soudaminee. The *patnidar*, however, refused to acknowledge her. The *patni* having been advertised for sale for arrears, the balance was paid by Soudaminee not on account of the *darpatnidar* but in her own name, her object

S. 13 of the Tenancy Act applies.

being to establish her position as *darpatnidar*. The *darpatnidar* contended that this payment made by Soudaminee should be deducted from the rent due by him. *Held* that he could not do so. "Till Soudaminee establishes her interest in the estate and obtains registration," it was said, "all payments made by her are those of a mere volunteer, and Sita Nath can claim no deduction for payments made by another person not on his account. In fact, the struggle has throughout been to force plaintiff to recognise Soudaminee; and till Soudaminee has a legal status, whatever she pays otherwise than on account of Sita Nath is paid at her own risk. Sita Nath cannot have credit for the payments." This decision has, however, been overruled in *Lakhi Narain Mitter & others* v. *Khetra Pal Sing* (15 W. R., 125; 20 W. R., P. C., 380; 13 B. L. R., 146; 2 P. C. R., 903). In that case a *darpatnidar* paid some money to save the superior *patni* from sale, and sued for refund. It was contended that the *darpatnidar* had not conformed to the requirements of section 5 of the Regulation, that is to say, that he had not furnished security or paid a fee or obtained registration of his name according to the forms laid down in that section; and that, therefore, not being a *darpatnidar*, he was not entitled to claim a refund. *Held* by the High Court that the *darpatnidar* was entitled to a refund even though his name was not registered in the office of the superior landlord. "There may be cases," remarked the Judges, "in which a party may become the purchaser of a *darpatni*, and the superior estate may be put up for sale and sold before he could possibly have time to effect the registration of his *darpatni* rights. Can it be said that in cases of this description, if the *darpatnidar* paid a sum of money on account of the rent due to the superior holder and saved the *patni* from sale, he would not be entitled to a refund of the sum so paid? The subordinate holder has an interest of his own to protect, which would be altogether sacrificed if he were not able to save the superior tenure from the hammer, for, with the superior tenure, all subordinate tenures fall in the event of sale; and, after all, the duties of the subordinate holder, as prescribed by the Regulation, are formalities. Their primary object is to give the superior holder information of who is his tenant; and, until they are conformed to, the superior holder is justified in looking to the registered tenant for his rent." *Held* also that, in view of section 5 of the Regulation, which says that it shall not be competent to the zamindar or other superior holder to refuse to register and otherwise to give effect to alienations which all *patnidars* and *darpatnidars* have a right to make without the consent of the zamindar, the status of a *darpatnidar* does not depend upon the registration or consent of the zamindar. This decision of the High Court was confirmed by the Privy Council. "The plaintiffs," observed their Lordships, "were assignees of the *darpatni taluk*, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the zamindar in order to protect their own interests. They made the deposit and the defendants had the benefit of it. The plaintiffs are consequently entitled to recover the amount from the defendants. The law upon the merits of the case is very accurately laid down in the judgment of the High Court." So also in *Okhoy Kumar Chatterjee & others* v. *Mahtab Chand Bahadur* (22 W. R., 299) which was a suit for the abatement of a *patni jama* on account of the fact that a part of the *patni* had been acquired by Government for irrigation purposes, and where

Position of an unregistered *darpatnidar*.

the lower Court had held that the fact of the special appellant's names not having been registered in the zamindari *sherista* operated as a bar to their maintaining the present suit, it was *held* that the status of a *patnidar* or *darpatnidar* did not depend upon registration or the consent of the zamindar. "We think," it was said, "that the Judge's decision is wrong in law. In a decision to be found in Vol. XV, W. R., 125 (*Khetra Pal Sing & another* v. *Lukhi Narain Mitter & another*) it was held by this Court that all *patnidars* and *darpatnidars* have the right to alienate, or otherwise transfer, their property without the consent of the zamindar, and that, under section 5, Regulation VIII of 1819, it would not be competent to the zamindar or other superior holder to refuse to register and otherwise to give effect to such alienations; and that the status of a *patnidar* or *darpatnidar* does not depend upon registration or the consent of the zamindar. That decision was upheld by their Lordships of Privy Council, and the law, as laid down in that case, was approved of by their Lordships in a decision to be found in 20 W. R., 380." The unregistered transferee of a transferable tenure cannot be treated by the landlord as a trespasser, and is entitled as against the landlord, who has evicted him, to be restored to *khas* possession (*Nobin Krishna Mookherji* v. *Shib Prasad Patak*, 8 W. R., 96).

An unregistered transferee not a trespasser.

Registered tenant liable for rent.

Payment of rent.—See notes under the same heading at p. 14. The cases quoted in the last paragraph show that, even when an assignment of a *darpatni* interest has taken place, the registered tenant remains still liable for the rent, and the landlord need only sue him. But he may also see the real tenant. In *Jadoonath Pal* v. *Prosunno Nath Dutt & others* (9 W. R., 71), where a suit for rent was brought against the real lessees in possession of a *darpatni*, it was *held* that a decree for arrear of rent may be given against the real lessees in possession although no previous realization of rent directly from them is established, and no written agreement is shown to have been executed by them in their own names, another party being the ostensible holder of the *darpatni* and not denying liability. Macpherson, J., observed that, when it was found that the defendants were in actual possession of the *darpatni*, "the relation of landlord and tenant existed between them and the plaintiff and they were liable for the rents, unless there was a special contract that the person whose name was used should alone be liable."

Real tenant may also be sued.

Interest.

Section 67 of the Bengal Tenancy Act provides that "an arrear of rent shall bear simple interest at the rate of twelve and a half per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the date of payment or of the institution of the suit." It has, however, been held that section 67 does not control section 179 of the same Act which provides that "nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent *mokurrari* lease on any terms agreed on between him and his tenant." Consequently, a lease of a *darpatni taluk*, created on the 13th February, 1886, *i.e.*, after the Tenancy Act had come into operation, by the terms of which the defendant was bound to pay rent in monthly instalments, and, if not so paid, to pay interest at the rate of 1 per cent. per mensem, is not affected by the provisions of section 67 of the Bengal Tenancy Act read with those of section 178 (3) (h) of the same Act, as the *darpatni* was a permanent lease granted by a permanent tenure-holder in a permanently-settled

S. 67 of the Tenancy Act does not control s. 179.

area (*Atulya Chandra Bosu* v. *Tulsi Dass Sarkar*, 2 C. W. N., 543). In *Basanto Kumar Roy Chowdhri* v. *Promotho Nath Bhattacharjee* (I. L. R., 26 Cal., 130; 3 C. W. N., 36), however, it was *held* that a contract by a tenant holding under a permanent *mokurrari* lease to pay interest on the arrear of rent at a higher rate than 12 per cent. per annum is not enforceable in law. The conflict between these two rulings was referred to a Full Bench by which it was decided that s. 179 does control s. 67 of the Bengal Tenancy Act and that the case of *Basanto Kumar Roy Chowdhri* v. *Promotho Nath Bhattacharjee* (I. L. R., 26 Cal., 130; 3 C. W. N., 36) was wrongly decided (*Matangini Debi* v. *Makrura Bibe*, 5 C. W. N., 438). The law, at present, therefore, seems to be that, even if a *darpatni* tenure-holder agrees to pay interest on arrears of rent at a higher rate than 12 per cent. per annum the contract is binding. In *Rajnarain Mitter* v. *Panna Chand Singh* (I. L. R., 30 Cal., 213), which was a suit for arrears of rent against the auction-purchaser of a *darpatni* tenure, where one of the questions was whether the auction-purchaser was bound by the clause in the *darpatni* lease stipulating for the payment of interest on the arrears of rent at the rate of Rs. 30 per cent. per annum, it was *held* that the auction-purchaser of a *darpatni* was bound by the stipulation contained in the *darpatni* lease as to the payment of interest for arrears of rent, such a stipulation, where there is nothing unusual in it, being a part of the ordinary incidents of a tenancy in the country.

Contract as to interest consequently binding.

The defendant, a *darpatnidar*, stipulated in the *kabuliyat* for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish. The stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable quarterly. *Held* (1) that such a stipulation is a stipulation for the payment of an *abwab*; and (2) that a stipulation for the payment of an *abwab* under a permanent *mokurrari* lease is valid under s. 179 of the Bengal Tenancy Act which is not controlled by section 74 of that Act (*Krishna Chander Sen* v. *Sushila Sundari Dassi*, I. L. R., 26 Cal., 611). In *Rajnarain Mitter* v. *Panna Chand Singh* (I. L. R., 30 Cal., 213; 7 C. W. N., 203) where a suit was brought for arrears of rent against the auction-purchaser of a *darpatni* tenure, and where one of the questions was, whether the auction-purchaser was bound by the clause in the *darpatni* lease stipulating for the payment of Rs. 10 annually in the event of default in supplying the landlord with a certain quantity of molasses, but which amount was not included in the rent mentioned in the sale-proclamation published for the sale of the *darpatni*, it was *held* that the landlord, the decree-holder, was not entitled to claim an amount not mentioned in the sale-proclamation. *Held* also that it is very doubtful whether a stipulation in the lease to pay a certain sum of money in default of the lessee's supplying the landlord with certain articles should be considered as an ordinary incident of the *darpatni* tenure. It may well be held to have been a personal covenant by the lessee by whom the *darpatni* was taken.

Abwab.

Stipulation to pay abwab binding.

Abatement of rent.—See notes under the same heading at pp. 24, 28. In a suit by a *patnidar* to recover rent in accordance with the terms of a *darpatni* lease, the defendant claimed an abatement of his *patni* rent on the ground that his predecessor in interest had obtained such an abatement in a rent suit brought by the *patnidar's* mother against him, in which it appeared that the lessee's share was slightly less than what had been described in the lease. *Held*

Abatement of rent.

that, unless the defendant could show that he had been damaged by plaintiff's misrepresentation as to the extent of his share, he could not be relieved from his contract, at least in this shape (*Gour Mohun Roy* v. *Radha Raman Sing*, 21 W. R., 372). See also *Okhoy Kumar Chatterjee* v. *Mahtab Chand Bahadur* (22 W. R., 299).

Refund.

Refund.—See notes under the same heading at p. 33. The defendants, after purchasing a *patni taluk* at an auction-sale for arrears of rent under Regulation VIII of 1819, granted a *darpatni* lease to the plaintiffs (the former *darpatnidars*) and received a bonus of Rs. 1,199. The auction-sale having been five years afterwards set aside, it was *held* (in accordance with the principles of equity and good conscience) that the plaintiffs were entitled to a refund of the bonus, although they had not been dispossessed, but had simply reverted to their former position as *darpatnidars* under the former *patnidar* (*Tarachand Biswas & others* v. *Ram Govinda Chowdhury & others*, I. L. R., 4 Cal., 778). An unregistered *patnidar*, who pays some money to save the superior *patni* from sale, is entitled to a refund even though his name is not registered in the office of the superior landlord (*Lakhi Narain Mitter & another* v. *Khetra Pal Sing & another*, 15 W. R., 125; 20 W. R., P. C., 380; 13 B. L. R., 146, 903.)

Patnidar who gives darpatni cannot measure raiyat's holdings.

Measurement.—See notes under the same heading at p. 45. A *patnidar* made an application under section 10, Act VI of 1862 (B. C.), to have the raiyats' holdings separately measured and their names and the rent payable by them recorded. Between him and the raiyats there were the *darpatnidars* and *shikmee talookdars*. *Held* that section 10, Act VI of 1862, contemplates the case of a proprietor of an estate who, by reason of his inability to ascertain who are the persons liable to pay rent to him, is unable to measure his estate, but not to that of a *patnidar* like the plaintiff who knows who is liable to pay rent to him as he has given a *darpatni*, and whose attempts to get the Collector's assistance in a minute measurement of the lands held by each of the raiyats is simply with a view to harass and oppress them. He may, however, be entitled to make a general survey of the land comprising the *darpatni* under section 9 of that Act. (*Dwarka Nath Chuckerbutty* v. *Bhowani Kishen Chuckerbutty*, 8 W. R., 11).

He is entitled to a general survey.

Darpatnidar cannot be ousted.

Ejectment.—A *darpatnidar* cannot be ousted so long as he pays his *darpatni* rents. In *Jadub Chander Thakoor* v. *Bhola Nath Singh Roy* (5 W. R., 51), one Gopal purchased at sheriff's sale a *patni* lot, Lot Kistobatee, described as consisting of 20 villages and passed his rights on to Jadub Chander. The latter alleged that this was only descriptive and that Lot Kistobatee consisted of really 27 villages and that consequently he was not to lose his rights to the 7 villages owing to misdescription or mistake. On going to take possession, Jadub Chander was ousted by a variety of claimants alleging rights in the 7 villages. He brought suits against them (making the *patnidars* also parties) and got decrees. In execution of those decrees, however, one Bhola Nath, alleging *darpatni* rights by mortgage in the 7 villages, intervened under section 269 of Act VIII of 1859 and his claim was admitted: Jadub Chander contended that, in face of the decrees in his favour, Bhola Nath had no *locus standi* in Court. *Held* that Bhola Nath had every right to come forward in execution with his *darpatni* claims, when, by Jadub Chander's prayer for *khas* possession, Bhola Nath's *darpatni* rights were invaded. *Held* also

that no *darpatni* rights passed by the sheriff's deed of sale, and that the purchase then made of the *patni* rights and interests did in no way give Jadub Chandra any right to oust the *darpatnidar*. "It may be quite possible," said the Judges, "that the judgment-debtor, in execution at the sheriff's sale, reserved to himself 7 of 27 villages and thus created the *darpatni* of them which he mortgaged to Bhola Nath; and it may also be true that the whole revenue and rent charges for Lot Kistobatee have been paid by the petitioner. Neither of these facts will entitle him to oust the *darpatnidar* under his present proceedings, so long as the *darpatnidar* pays his *darpatni* rents and is not ousted by regular course of law." In *Mathoora Mohan* v. *Ramlal* (4 C. L. R., 46) where a *sepatni* was granted to *B* by *A* who held a *darpatni* containing the following conditions, *viz.*, "I shall pay rent month by month; should I fail in that I shall pay interest on instalments overdue at 1 per cent. per month. I shall pay the rent in full by the close of every year. Should I neglect to make the payments, you will, of your own authority, take over possession of the said *darpatni taluk* after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so." Upon non-payment of the rent for 1281, a suit for *khas* possession of the lands was brought against *A* and *B*. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the *darpatni* together with all costs. The Court (Pontifex and McDonell, JJ., observed: "We do not think it necessary to decide in this case whether or not the provisions of the Rent Laws actually apply; because we think that, even if they do not in terms apply, we are bound by analogy to that law to apply in favour of the defendants an equity similar to the equity there given. We therefore think that if the defendants pay the whole of the rent due up to the present time with interest according to the stipulations of the original *kabuliyat* and *patta*, and also pay all the costs of the proceedings in both this Court and of the Courts below, the plaintiff ought not to have *khas* possession decreed to him." A *darpatni* lease granted upon the payment of a bonus contained a condition that, if the annual rent remained for a longer period than one month in arrear, the lessor should have a right of re-entry. The lessor upon default in payment of rent, without availing of the forfeiture, instituted a summary suit for the arrears of rent, and, upon an award thereon, the lands were sold for such arrears. It was *held* that the purchaser who bought the *patni* tenure without notice of the condition for forfeiture, was not subject to that condition (*Deen Dayal* v. *Jageshwar*, Marsh., 252).

Right of suit.—A holder under a *darpatnidar* of a portion of a *patni taluk* has a right to sue for possession (*Tara Sundari* v. *Shama Sundari*, 4 W. R., 58). Where a *patnidar*, while out of possession of the *patni* estate, granted a *darpatni* thereof, it was *held* that the *darpatnidar's* suit against third persons, who were in possession of the estate, to recover possession would lie, it appearing that the plaintiff had paid an adequate consideration for the *darpatni* (*Lokenath* v. *Jagabandhu*, I. L. R., 1 Cal., 297).

5. The right of alienation having been declared to vest in the holder of a *patni taluk*, it shall not be competent to the zamindar or other superior to refuse to register and otherwise to give Zamindar not entitled to refuse to give effect to a transfer.

effect to such alienations by discharging the party transferring his interest from personal responsibility and by accepting the engagements of the transferee. In conformity, however, with the established usage, the zamindar or other superior shall be entitled to exact a fee upon every such alienation, and the rate of the said fee is hereby fixed at two per cent. on the *jama* or annual rent of the interest transferred, until the same shall amount to one hundred rupees, which sum shall be the maximum of any fee to be exacted on this account. The zamindar shall also be entitled to demand substantial security from the transferee or purchaser to the amount of half the *jama* or yearly rent payable to him from the tenure transferred, the condition of furnishing such security or requisition being understood to be one of the original liabilities of the tenure. The above rules shall apply equally to the case of a sale made in execution of a decree or judgment of Court, as to all other alienations; but it shall not apply to the case of a sale for an arrear in the rent due to the zamindar or other superior under the rules hereinafter contained. The purchaser at such a sale shall be entitled to have his name registered and to obtain possession without fee, though of course liable to be called on to give security under the conditions of the tenure purchased.

But may demand fee fixed at two per cent. on the *Jama*.

But the maximum one hundred rupees.

May also demand security, as far as half the *Jama*.

Above rules to apply to sales in execution and all alienations.

But no fee on sale for arrears.

Notes.

See notes under sections (3) & (4); see section 17 of Act VIII of 1865. This section should be read along with section 6 (see *infra*).

Zamindar may refuse sanction to transfer, till fee and security tendered.

6. It shall be competent to the zamindar or other superior to refuse the registry of any transfer until the fee above stipulated be paid, and until substantial security to the amount specified be tendered and accepted:

Provided, however, that if the security tendered by any purchaser or transferee should not be approved by the zamindar, and the party tendering it shall be dissatisfied with such rejection, he shall be competent to appeal therefrom by petition or common motion in the Civil Court of the district, which authority, if satisfied of the sufficiency of the security tendered, shall issue an injunction on the zamindar to accept it and give effect to the transfer without delay.

It is hereby provided that the rules of this and of the preceding section shall not be held to apply to transfers of any fractional portion of a *patni taluk*, nor to any alienation other than of the

entire interest; for no apportionment of the zamindar's reserved rent can be allowed to stand good unless made under his special sanction.

Notes.

Registration in cases of voluntary alienations.—See section 12 of the Bengal Tenancy Act. In cases of voluntary alienations, a zamindar or superior landlord is entitled to demand (1) a registration-fee at two per cent. on the rent, the maximum sum being Rs. 100, and (2) security to the extent of one-half of the annual rent. Where a gift was made of a *patni taluk* by the registered tenant to her sons, it was *held* that the latter were bound to get their names registered after the gift, and that the zamindar was not bound to accept any rent from them (*Saibesh Chandra Sarkar* v. *Kumar Bonwari Mukund Deb Bahadur*, 13 C. W. N., 290*n*). Observe that this rule does not apply to transfers of any fractional portion of a *patni taluk* nor to any alienation other than of the entire interest, unless made under the zamindar's or superior landlord's special sanction.

Zamindar entitled to registration fee and security.

Although, however, the transferee of a fractional share of a *patni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet it does not follow that such a transfer is altogether void, or that the transferee of such a share is not liable for rent jointly with the registered tenant if the landlord chooses to recognize him as one of the joint holders of the *patni* (*Sourindro Mohan Tagore* v. *Sarnomoyee*, I. L. R., 26 Cal., 103; 3 C. W. N., 38). The true meaning and intention of the provision of the latter portion of section 6 is, observed the Judges in this case, "not to make the alienation of a fractional portion of a *patni taluk* without the sanction of the zamindar absolutely *void*, nor even to exempt the transferee from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint holders of the *patni*, but only to prevent any splitting of the tenure and apportionment of the rent without the sanction of the landlord, as the concluding words of the section, which contain the reason for the provision, clearly show." By suing the unregistered transferee of a part of the *patni* jointly with the transferor, the zamindar only recognises him as one of the joint holders of the *patni*, but because he does so, he cannot be said to have waived the right secured to him by section 6 of Regulation VIII of 1819 to preserve the unity of the tenure held under him without splitting and apportioning his rent (*Ibid*). Again, where on a former occasion the purchaser of a tenure applied for leave to deposit the judgment-debt under section 170, sub-section (3) of the Bengal Tenancy Act and his application was opposed by the decree-holder, but the Court decided that the petitioner was interested in the tenure and the landlord withdrew the deposit made by the petitioner in pursuance of the order of the Court, it was *held* that the effect of the decision was that, as between the landlord and the transferee of a share of the tenure, it was conclusively settled that the transferee had acquired an interest in the tenure by the purchase, and that, as the landlord had withdrawn the sum deposited, it was no longer open to him to dispute the title of the depositor. (*Jugal Moni Dassi* v. *Sreenath Chatterjee*, 12 C. L. J., 609; 3 C. C. L., 39).

Position of a transferee of a fractional share.

Registration of changes by operation of law.—See section 13 of the Bengal Tenancy Act. A purchaser of a *patni taluk* under the rules laid down in the Regulation or at a sale under a decree for arrears of rent held by a Civil Court is entitled to have his name registered in the proprietor's office and to obtain possession without the payment of any fee, but he is liable to be called upon to give security under the conditions of the tenure purchased. A zamindar or superior landlord is, however, entitled to demand from a purchaser at a sale under an ordinary Civil Court decree the same fee and security as from avoluntary alience. In *Sourindro Nath Pal Chowdhury* v. *Tincowri Dassi* (I. L. R., 20 Cal., 247), the plaintiff brought a suit to recover arrears of rent from *Asar* 1293 to *Magh* 1296 in respect of a *patni taluk*. The defendants admitted having held the *taluk* up to the end of *Aghran* 1294, but contended that, as the *patni taluk* had then been sold in execution of a decree and purchased by one *S*, they were not liable for rent which accrued after that date. The auction-purchaser (*S*) had obtained possession of the *taluk*, but did not get himself registered in the zamindar's *sharista*, as he disputed the amount of fee payable by him. *Held* that the suit lay against the defendants who were the old tenants, and that the rights of the zamindar were not affected by the existence of the remedy provided by section 7 of Bengal Regulation VIII of 1819. The law on the point, observed the Judges, was laid down in *Lakhi Narain Mitter* v. *Khetter Pal Sing* (13 B. L. R., 146) where the Judges said: "The zamindar or other superior landlord in certain cases is empowered to attach the property, if the subordinate holder neglects to register his name and to hold it in trust for the subordinate holder, and in all cases until the transfer is registered the old tenant and the tenure itself are liable for the rent."

Purchaser at a *patni* sale or sale for arrears of rent need not pay any fee.

But a purchaser at an ordinary civil court sale must.

It should be observed that section 13 of the Bengal Tenancy Act, which provides for the payment of landlord's fee and a further fee for service of notice of the sale on the landlord in cases of sales of permanent tenures in execution of decrees other than decrees for arrears of rent due in respect thereof, does not apply to *patni* tenures, these tenures being specially saved from its operation by s. 195, clause (*e*) of that Act (see notes on p. 46.). In *Gyanada K. Roy Bahadur & others* v. *Bromomoyi Dassi* (I. L. R., 17 Cal., 162), where the interests of the defendants in the *patni* were sold in execution of a decree and were purchased by one Bromomoyee Chowdhurani, who, by virtue of her purchase, obtained possession of the *patni* and deposited in Court what is called the landlord's fee and the further fee for service of notice of the sale on the landlord as required by s. 13 of the Bengal Tenancy Act, and where the plaintiff refused to recognise the sale and brought a suit against the defendants, who were the heirs of the registered tenant, for arrears of rent, it was *held* that, having regard to sections 5 and 6 of the Regulation, the purchaser ought to have applied to the zamindar to register the transfer of the tenure and at the same time to have paid or tendered the prescribed fee as required by those sections, and that, as the purchaser had not done so, the plaintiff had a right to refuse to recognise the sale and to look to the ostensible tenants (*i.e.*, the defendants) for rent. It was also held that, under the circumstances mentioned, there were two courses open to the zamindar (plaintiff), *viz.*, either she could refuse to recognise the transfer

S. 13, B. T. A., does not apply to *patni* tenures.

and the purchaser as her tenant until the rules laid down in s. 5 had been complied with, or she could take proceedings under s. 7.

The provisions of s. 13 of the Bengal Tenancy, however, apply to the sales of *darpatni taluks* in execution of decrees, as the provisions of s. 195, cl. (*e*), of that Act apply only to enactments relating to *patnis* properly and strictly so called, and must be treated as excluding those which relate to tenures, which though resembling *patnis*, as *darpatnis*, &c., are not strictly *patnis*, not possessing all the qualities of them (*Mahamad Abbas Mandal* v. *Brojo Sundari Debya*, I. L. R., 18 Cal., 360). See also notes under the heading "Effect of the Bengal Tenancy Act on patni tenures" in section 1, p. 46.

But s. 13, B. T. A., applies to *darpatni taluks*.

Registration of changes by death. See sections 15 and 16 of the Bengal Tenancy Act. In one case, it was decided that, on the death of a registered *patnidar*, a zamindar is not bound to recognise any one as his tenant without registration in his *sherista*; nor is he prevented from putting in a *sezaoal* to collect the rents until a declaration of the rights of the deceased *patnidar's* heirs (*Ram Charan Bandapadhya* v. *Dropomoyi Dassee*, 17 W. R., 122). It should be noticed, however, that Regulation VIII of 1819 provides no procedure for the registration of changes in the holders of *patni* tenures which are affected by death and operation of law. The provisions of sections 5 and 6 clearly apply to voluntary alienations and not to successions and transfers by operation of law. In such cases, therefore, no registration in the zamindar's *sherista* is necessary, but it has been held that sections 15 and 16 of the Bengal Tenancy Act apply to *patni* tenures, notwithstanding the provisions of sec. 195 (*e*) (*Durga Prasad Bandapadhya* v. *Brindaban Rai*, I. L. R., 19 Cal., 504). Consequently, a person succeeding to a *patni* tenure must give notice of the succession and pay the requisite landlord's fee to the zamindar through the Collector, and, until he does so, he will not be entitled to recover rent from his tenants by suit, distraint or other proceeding. So, where *A* acquired a *patni* in the name, and for the benefit, of an idol of which he was the *shebait* and where upon his death he was succeeded as *shebait* by *B* who did not give notice to the Collector or pay the fee under section 15 of the Bengal Tenancy Act, it was *held* that a suit for rent brought by *B* against a tenant was barred by s. 16 of the Act (*Mabatulla Nasyar* v. *Nalini Sundari Gupta*, 2 C. L. J., 377). It is the duty of persons succeeding by inheritance to a permanent tenure to notify the succession, and it is not the duty of the superior landlord to find out who all the heirs of the deceased tenure-holder are. Accordingly, when a person is admittedly one of the heirs and, as such, in possession and liable for the rent, he cannot defeat a landlord's suit for rent by showing that there are other heirs equally liable, unless possibly he goes further and shows that their names have been notified to the landlord as successors of the original holders or that they have been paying the rent and getting receipts as successors (*Khettro Mohan Pal* v. *Pran Krishna Kabiraj*, 3 C. W N., 371). In a suit brought by *patnidars* on the death of the last owner for arrears of rent which accrued due before his death, the defence of the *darpatnidar* was that, as the plaintiffs had not complied with the terms of section 15 of the Bengal Tenancy Act, the suit was not maintainable, and it was *held* that, as the plaintiff did not claim the rent as the holders of the tenure, but as the

Procedure in cases of succession.

No registration in zamindari *sherista* necessary.

But ss. 15 & 16 of the Bengal Tenancy Act apply.

representatives of the holder or of their father, the rent became an increment to the estate of the father and that, therefore, the suit was maintainable (*Sheriff* v. *Jogemaya Dassi*, I. L. R., 27 Cal., 535).

A *patnidar* may bring a suit to register his name.

Suit to compel the registration of names.—According to section 6 a mere application for registration is not sufficient; that section specifically provides what is legally to be done if the request be refused (*Kisto Jibun* v. *A. B. McIntosh*, Spl. W. R., 53). On an appeal from the order of a Commissioner relating to the registry of a *darpatni* tenure, the Board *held* that, while each under-holder has a right to demand registration in the office of his superior, that superior has *per contra* the right to demand the prescribed fee and substantial security (Board's Miscellaneous Proceedings of May 1866, No. 24). There is, however, no appeal against an order passed by the Civil Court under this section. Thus, in the matter of the petition of *Surja Kanta Acharj Chowdhury* (I. L. R., 1 Cal., 383), *A* was the owner and zamindar of an estate called Shershabad. *B* having acquired by purchase a *patni* tenure within this estate, applied to him to give effect to the transfer by registration of his name in his *sherista* or office, but *A* refused to. *B* then made an application to the Civil Court of the District where the property was situated under section 6 of Reg. VIII of 1819, and the District Judge issued an order directing *A* to give effect to the transfer without delay in accordance with the law. *A* appealed. *Held* that there is no appeal from an order made by the Civil Court under section 6 of Reg. VIII of 1819. *Quære:* Does an appeal lie under s. 15 of the Charter Act?

Board's Proceedings.

But not a *se-patnidar*.

A *se-patnidar* is not entitled to sue a *darpatnidar* to compel him to register his name in his *sherista* as the transferee of a *se-patni* tenure, but it is open to him to sue for a declaration of his right as the tenant of the *darpatnidar* (*Moti Lall Singh* v. *Sheik Omar Ali*, 3 C. W. N., 19).

A zamindar cannot sue for security.

Suit to compel a transferee to furnish security.—A zamindar cannot bring a suit in the Civil Court to compel the purchaser of a *patni* in his estate, sold by auction for arrears of rent, to furnish security for the amount of half the yearly *jama*. If the purchaser of the *patni* is not willing to give security for the payment of his rent, the zamindar's remedy is, under sections 5 and 7 of Regulation VIII, to appoint his own *sezawal* for collection and deduct his own rent from the collections, before handing over the surplus to the *patnidar*, who moreover is declared by section 7 to take all the risks of attachment. The remedy of the zamindar is not affected by the grant of a *darpatni* to a third party (*Joy Kishen* v. *Janaki Nath*, 17 W. R., 470). Where, however, no security is demanded by the landlord under section 6 of Regulation VIII of 1819 and no default is made by the purchaser, but, on the contrary, where the purchaser makes repeated tenders of the rent, instalment by instalment, and endeavours to secure recognition, the refusal of the landlord to recognise the transferee is entirely indefensible. (*Govinda Sundari Sinha Chowdhury* v. *Srikrishna Chakravarti* 10 C. L. J., 538).

He must proceed under s. 7 of the Regulation.

Where no security is demanded and rent is tendered, zamindar's refusal indefensible.

Effect of registration.

Effect of Registration.—The registration of name in the zamindar's *sherista* is of great importance both to the outgoing *patnidar* and to the purchaser or transferee. It relieves the former of all personal responsibility as to the payment of rent subsequent to the cessation of his possession, while it enables the latter to deal directly with the landlord and affords him a better

opportunity of protecting his tenure. Unless a purchaser's name is registered in the landlord's office, the landlord may bring suits against the registered *patnidar* for recovery of arrears of rent or may institute proceedings under the Regulation. The primary object of registration is to give the superior holder information as to who is his tenant, and, until the formalities prescribed by the Regulation are conformed to, the superior holder is justified in looking to the registered tenant for his rent (*Lakhi Narain Mitter* v. *Khettra Pal Sing & another*, 15 W. R., 125). This case went on appeal to the Privy Council and, while confirming the judgment of the High Court, their Lordships observed:—"Until the assignment has been registered, or the assignor has been accepted by the *patnidar* or his tenant, the assignor is not discharged from liability, and such liability may be enforced by the sale of the *darpatni taluk* in execution of a decree against him for the rent." (*Lakhi Narain Mitter* v. *Khettra Pal Sing*, 20 W. R., P. C., 380; 13 B. L. R., 146 2 P. C. R., 903). In a suit for arrears of *patni* rent, a zamindar, while applying to the Collector to bring the property to sale, need not recognise any one but the registered *patnidar* (*Raghab* v. *Brojo Nath*, 14 W. R., 489). Where the purchaser or transferee has failed to register his name, the effect of a sale in suits or proceedings against the registered tenant is the same as if the purchaser himself has been sued, unless it can be proved that fraud has vitiated the sale. A person who acquires a *patni* tenure at a sale in execution of a decree for money against the *patnidar*, but who does not get his name registered in the landlord's office is bound by a subsequent decree for arrears of rent against the registered tenant and by the sale in execution of such a decree, and is, therefore, a representative of the judgment-debtor within the meaning of s. 244 of the Civil Procedure Code (*Surendro* v. *Gopi Sundari*, 9 C. W. N., 824; I. L. R., 32 Cal., 1031). See also *Ishan Chandra Sirkar* v. *Beni Madhab Sircar* (I. L. R., 24 Cal., 62); *Asgar Ali* v. *Asabuddin Kazi* (I. L. R., 9 C. W. N., 134). The non-registration of name in the zamindar's *sherista* will not, however, make the transferee a trespasser. The unregistered transferee of a transferable tenure cannot be treated by the landlord as a trespasser, and is entitled as against the landlord, who has evicted him, to be restored to *khas* possession (*Nobin Krishna Mookerjee* v. *Shib Prasad Patak*, 8 W. R., 96). In *Lakhi Narain Mitter* v. *Khetra Pal Sing & others* (15 W. R., 125), it was *held* that, in view of section 5 of the Regulation which says that it shall not be competent to the zamindar or other superior holder to refuse to register and otherwise to give effect to alienations which all *patnidars* and *darpatnidars* have a right to make without the consent of the zamindar, the status of a *patnidar* or a *darpatnidar* does not depend upon registration or the consent of the zamindar. The same view was held in the case of *Okhoy Kumar Chatterjee* v. *Mahtab Chand Bahadur* (22 W. R., 299). In one case it was held that the plaintiff having omitted to have his name registered was not in a position to sue to set aside the sale (*Gossain Mongal Dass* v. *Babu Roy Dhunput Singh*, 15 W. R., 152). But this decision has practically been overruled by *Chundy Prasad* v. *Shubhadra* (I. L. R., 12 Cal., 622) and by *Joy Kissen* v. *Sarafunnessa* (I. L. R., 15 Cal., 345), where it has been held that an unregistered proprietor of a *patni* tenure may institute such a suit. In the last-mentioned case the exact effect of sections 5 and 6 of the Regulation was considered. "The effect of the provisions of those sections," observed Petheram, C. J.,

Primary object of registration.

Recorded tenant liable for rent where there is no registration.

Effect of sale where tenant is not registered.

But an unregistered tenant is not trespasser.

Position of an unregistered tenant.

"amounts to this, that upon an alienation or transfer by the *patnidar*, the zamindar may exact a fee, which represents his profit, being the portion of his interest in the property whenever a transfer of the tenure is made, the amount of which is regulated by the Regulation itself, and further than that, until the fee has been paid, the zamindar shall not be bound to register the transfer, and further than that, until the transfer has been registered, he shall not be bound to recognise the transfer in any way—that is to say, until his demand has been satisfied and registration has been effected, the old tenant remains his tenant, and the relation of landlord and tenant has not been created between him and the assignee of the *patnidar*, whatever the arrangement may be between the *patnidar* and his assignee. This is the effect, so far as I can see, of these sections, that until the terms of the Regulation have been complied with, and until the fee has been paid, and the registration effected, the relation of landlord and tenant continues to exist between the landlord and the old tenant, and no privity of contract and no relation of landlord and tenant exists between the landlord and the assignee. But this is all, the Regulation does not say, and it would be very inequitable that it should say, that no interest whatever could be created in the tenure by the assignor, or that no person could obtain any interest whatever in the tenure, without the registration of the transfer. Any interest which could be created consistently with the remaining in existence of the original tenure can be created without the Regulation, and, so far as I can see, is not prevented by the Regulation in any way." This view was followed in the case of *Harak Chand Babu* v. *Charu Chandra Singh* (15 C. W. N., 5; 3 C. C. L., 81), where it was *held* that the absence of registration of the *patnidar's* name in the zamindar's *sherista* cannot bar the *patnidar* from bringing a suit to recover possession of *chaukidari chakaran* land, if on the evidence it is proved that he has established his title as *patnidar*. So also an unregistered tenant can bring a suit for recovery of surplus sale-proceeds (*Matungini* v. *Sreenath*, 7 C. W. N., 552).

Limitation.

Limitation.—Applications for registration of name may be made, or suits for compelling the landlord to register may be instituted, at any time after the purchase; there is no bar of limitation, the cause of action being a recurring one. (*Govind* v. *Rungo*, I. L. R., 6 Cal., 60; *Ishan* v. *Chandra*, I. L. R., 6 Cal., 70).

Upon public sale, if security not tendered within one month, zamindar may attach.

7. In case of the sale of a *patni* tenure in execution of a judgment of Court, if the purchaser do not, within the period of one month from the sale, conform to the rules of section 5 of this Regulation, in order to obtain the transfer of his tenure by the superior to whom the rent fixed upon it is payable, the zamindar or other superior shall be entitled, of his own authority, to send a *sazáwal* to attach and hold possession of the tenure until the forms prescribed be observed.

In case also of the sale of a *patni* tenure for arrears of the rent due upon it, under the rules of this Regulation, if security be required by the zamindar and the purchaser fail to furnish the same

within one month of the date of sale, the zamindar shall similarly be entitled to send a *sazáwal* to attach and hold possession of the interest which may have passed on the sale, to the exclusion of the purchaser, until the prescribed security be given.

Attachments made under this section shall be regarded as trusts for the benefit and at the risk of the purchasers: consequently, after deducting the rent due and the expense of attaching, any surplus that may be yielded by the collections shall be held in deposit for such purchaser: but, if the collections for the time fall short of the rent, the tenure and person of the proprietor shall be liable in the same manner as if no attachment had been made, and the accounts produced by the zamindar or other superior making the attachment shall be received as *primâ facie* evidence to warrant process for an arrear so accruing.

Attachment to have effect of trust.

Notes.

Observe that this section applies only to the sale of a *patni* tenure in execution of a judgment of Court or under the rules of the Regulation, but not to voluntary alienations.

Remedy open to a zamindar if a purchaser does not give security.—If the purchaser of a *patni* is not willing to give security for the payment of his rent, the zamindar's remedy is, under Regulation VIII of 1819, sections 5 and 7, to appoint his own *sazawal* or collector, and deduct his own rent from the collections before handing over the surplus to the *patnidar*, who, moreover, is declared by s. 7 to take all the risks of the attachment. This remedy of the zamindar is not affected by the grant by the purchaser of a *darpatni* of the interest he has purchased to a third party. "A *darpatnidar*," observed Glover, J., "appointed under the terms of Regulation VIII is in the same position as the original *patnidar*, has all his rights, and at the same time, all his liabilities to the zamindar....The grant of a *darpatni* to a third party would not annul the law, or prevent the appointment by the zamindar of a *sazawal*, should no arrangements be made for giving security for rent. If this were so, the Regulation would be a dead letter." (*Joy Kishen Mukherjee* v. *Janoki Nath Mukherjee*, 17 W. R., 470). If, by reason of the *patnidar* not giving security, the zamindar withholds his *amaldastak* and also abstains from availing himself of the power which the law gives him of collecting the rents himself, it would be inequitable to allow him to recover from the *patnidar* the rent which the withholding of the *amaldastak* has prevented his collecting (*Bidhu Mukhi Debee* v. *Nilmoni Sing Deo*, 1 C. L. R., 464).

He must proceed under s. 7.

If he does not act under s. 7 or grant *amaldastak* *patnidar* not liable for rent.

Remedies open to a zamindar if a purchaser does not register.—In the case of *Lakhi Narain Mitter* v. *Khetra Pal Sing* (15 W. R., 125), it was observed that, under the Regulation, the zamindar or other superior holder is in certain cases empowered to attach the property, if the subordinate holder neglects to register his name, and to hold it in trust for the subordinate holder; and

that in all cases, until the transfer is registered, the old tenant and the tenure itself are liable for the rent due. So also in *Gyanada Kanta Roy Bahadur* v. *Bromomoyi Dassi* (I. L. R., 17 Cal., 162), it was held that, where a *patni* is sold in execution of a decree and the purchaser does not apply to the zamindar to register the transfer, and, at the same time, pay or tender the prescribed fee as required by section 5, the zamindar has two courses open to him, *viz.*, either to refuse to recognise the transfer and the purchaser as his tenant, until the rules laid down in section 5 has been complied with, or she can take proceedings under section 7. In *Sourendro Nath* v. *Tincowrie* (I. L. R., 20 Cal., 247), a *patni taluk* was sold in execution of a decree, but the auction-purchaser, although he obtained possession, did not get himself registered in the zamindar's *sheristu*. In a suit by the zamindar against the former holder of *patni* for rent due for a period previous to the sale, it was *held* that the suit lay against him, and that the rights of the zamindar were not affected by the existence of the remedy provided by section 7 of Regulation VIII of 1819. Referring to this state of the law, their Lordships observed in this case:—"Whether this is a *casus omissus* in the law or whether the former tenant, compelled in this suit to pay the rent of a property of which he is not in possession, has any remedy against the unregistered purchaser in possession, provided it be established that the purchaser has refused unreasonably and improperly to get himself registered in the zamindar's books and thereby to relieve the former tenant from liability, is a matter which is not before us and which we have no right to determine. What we have before us is simply this question: Does or does not this suit lie against the old tenant and we think we are bound to hold that the rights of the zamindar, as stated in the judgment of this Court to which we have referred (*Lakhi Narain Mitter* v. *Khetra Pal Sing*, 15 W. R., 125), are not affected by the existence of the remedy provided by section 7, and that there is no defence to the suit." A person who has purchased a *patni* holding at a sale in execution of a money-decree, but has not had his name registered in the landlord's *sheristu* is bound by a subsequent decree for arrears of rent obtained by the landlord against the registered *patnidar* and by the sale in execution of such a decree, and is, therefore, a representative of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code (*Surendra* v. *Gopi Sundari*, I. L. R., 32 Cal., 1031; 9 C. W. N., 824).

Two courses open to him.

Zamindars to be allowed periodical sales of tenures, in which right to sell for arrears is reserved.

8. *First.*—Zamindars, that is, proprietors under direct engagements with the Government, shall be entitled to apply in the manner following for periodical sales of any tenures upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. The exercise of this power shall not be confined to cases in which the stipulation for sale may have been unrestricted in regard to time, but shall apply equally to tenures held under engagements stipulating merely for a sale at the end of the year, in conformity with the practice heretofore allowed by the Regulations in force.

Second.—On the 1st day of Baisakh, that is, at the commencement of the following year from that of which the rent is due, the zamindar shall present a petition to the Collector, containing a specification of any balances that may be due to him on account of the expired year from all or any *talukdars* or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the *cutcherry*, with a notice that, if the amount claimed be not paid before the first of Jeyt following, the tenures of the defaulters will on that day be sold by public sale in liquidation. Should, however, the first of Jeyt fall on a Sunday or holiday, the next subsequent day, not a holiday, shall be selected instead; a similar notice shall be stuck up at the sadar *cutcherry* of the zamindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the *cutcherry*, or at the principal town or village, upon the land of the defaulter. The zamindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or of his manager, for the same; or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the fifteenth of the month of Baisakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the *cutcherry* of the nearest Munsiff, or, if there should be no Munsiff, to the nearest thana, and there make voluntary oath of the same having been duly published; certificate to which effect shall be signed and sealed by the said officers and delivered to the peon.

First sale to be applied for on 1st Baisakh.

Third.—On the 1st day of Kartik, in the middle of the year, the zamindar shall be at liberty to present a similar petition with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Asin, and to cause similar publication to be made of a sale of the tenures of defaulters to take place on the 1st of Aghan, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any interme-

Mid year sale to be applied for on 1st of Kartik.

diate demand for the month of Kartik, to less than one-fourth, or a four-anna proportion, of the total demand of the zamindar, according to the *kistbandi*, calculated from the commencement of the year to the last day of Kartik.

Notes.

Modifications.—Clause (2) of this section has been modified by Act XXXIII of 1850, s. 1. Certain words of this clause, repealed by Act XVI of 1874, s. 1, have been omitted.

Two classes of saleable tenures.

Two classes of transferable tenures.—"There are two classes of saleable tenures, *viz.*, (1) tenures transferable by the title-deeds; (2) tenures transferable by the established usage of the country. Section 8 of Regulation VIII of 1819 speaks of the first class only, *viz.*, 'tenures upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure,' and a sale of tenures of this class, when made under the Regulation (VIII of 1819) conveyed the tenure free of all incumbrances that accrued upon it by the act of the defaulter (s. 11). In case of a sale of a tenure of this class made otherwise than under the Regulation this result did not follow, for cl. 7, s. 15, Regulation VII of 1799, did not declare that a sale should have this effect, and there was no other Regulation which did. The anomaly was, however, remedied by Regulation I of 1820 (see Preamble, *post*), which enacted that tenures of the nature defined in cl. 1, s. 8, Reg. VIII of 1819, *i.e.*, tenures of the first of the above classes, when brought to sale under any summary process authorised by the Regulations, should be sold in the mode prescribed by Regulation VIII for the periodical sales allowed thereby. Clause 2 of s. 2 further made applicable to all such sales the rules of sections 9, 11 (voidance of incumbrances by sale), 13, 15 and 17. The result was that after the passing of Regulation I of 1820, whenever a sale of a tenure of the first of the above classes took place for arrears of rent, whether such sale was made under the provisions of s. 8, Regulation VIII of 1819, or under any summary process authorized by the Regulations, the sale passed the tenure free of all incumbrances which had accrued by the act of the defaulter, with the exception of those mentioned in cl. 3, s. 11, Regulation VIII of 1819."

Reg. VIII of 1819 speaks of tenures transferable by the title-deeds.

Reg. I of 1820 makes the tenures saleable free of incumbrances whether the sale is held under Reg. VIII or any other summary process.

"In the case of the second class of tenures, however, *i.e.*, tenures transferable by the established usage of the country, a sale had no such effect until the passing of Act VIII (B. C.) of 1865." Field's Regulations, p. 513.

Ben. Act VIII of 1865 makes the rule applicable to tenures transferable by the established usage of the country.

Chapter XIV of the Bengal Tenancy Act also applicable to patni tenures.—Observe that it has been held in *Durga Prosad Bandopadhya* v. *Brinduban Rai* (I. L. R., 19 Cal., 504) that the provisions of the Bengal Tenancy Act (VIII of 1885), so far as they do not interfere with the *patni* law in respect of the *patni* tenures, apply to them. Consequently, the landlords of *patni taluks* may also sell them under the provisions of Chapter XIV of the Bengal Tenancy Act (VIII of 1885), in execution of decrees for arrears of rent, if they choose to.

Proceedings on an application for the sale of a tenure analogous to the remedy by distress.—An application for the sale of a tenure, where a right of sale

has been specially reserved, in order that the applicant may, out of the proceeds of the sale, realize his rent is something quite distinct from a suit. The investigation which may be demanded by the *patnidar* under cl. 1, s. 14, is, no doubt, a summary suit. But the sale is not to be stayed till that suit is decided. The proceedings on the petition of the zamindar to bring the estate to sale are more analogous to the remedy by distress than to a suit (*Kristo Mohan Shaha* v. *Aftaboodeen Mahomed*, 15 W. R., 560).

Board's Proceedings.

Nawab Nazim's Debt Act.—When a property mentioned in the schedule of the Nawab Nazim's Debt Act (XVII of 1873) was applied to be sold under the *patni sale* law by the superior landlord (*Raja Ruknee Ballav*), the Nawab Nazim's son and representative, the Nawab of Murshidabad, took objection to the application, saying that, under the Nawab Nazim's Debt Act, the property could not be sold by the Collector without the previous sanction of the Governor-General in Council. The objection prevailed before the Collector of Murshidabad and before the Presidency Commissioner, but the receiver, Mr. Belchambers, on behalf of the estate of Raja Ruknee Ballav, moved the Board of Revenue who decided, on the advice of the Legal Remembrancer, that the Nawab Nazim's Debt Act was a purely personal enactment and that, therefore, the objection made by the Nawab of Murshidabad as to the property being sold under the *Patni* Sale Law was not valid (*vide* judgment of the Board of Revenue in appeal No. 183 of 1895 decided by the Hon'ble C. C. Stevens, dated the 24th April 1896).

Either the proprietor or proprietors jointly or common manager must apply.

Who can apply for sale.—The Regulation contemplates the sale of a *patni* by the proprietor of an entire estate. Consequently, either a recorded proprietor, or proprietors jointly, or a common manager whose name is duly registered may only make the application. A co-proprietor or a co-sharer has no such right, unless the *patni* is co-extensive with his own interests. Even if, subsequent to the creation of the *patni* by a number of proprietors jointly, the *patnidar* pays his rent to each of them separately according to their shares, they are not entitled to apply individually. A person who had purchased a six-anna share of an estate and let it out in *patni* applied for the sale of the *patni* tenure for arrears of rent in accordance with the stipulation in the *kabulyats*. The Collector, after holding a summary enquiry, declined to sell on the ground that the petitioner was a sharer and that, therefore, the tenure could not be sold unless the other proprietors in the share joined him. The Commissioner dismissed the appeal against the Collector's proceedings. The Board, on appeal, held that the orders passed by the local authorities were correct (Board's Miscellaneous Proceedings of 18th March 1876, No. 189). But if the several fractional proprietors and the *patnidar* enter into separate engagements by executing leases and counter-parts, the right of each proprietor may be recognised by the Collector. The question whether fractional portions of *patni taluks* can be sold under the provisions of the Regulation was referred to the Legal Remembrancer, who held that a fractional portion could not be sold unless there was a distinct stipulation to that effect in the engagement interchanged at the creation of a *patni* tenure. Where, however, an estate is held in *patni* from more than one zamindar under different deeds, each deed may be held to have created a separate *patni* and may be sold without reference to the tenures of the other fractional portions of the parent estate (Board's Miscellaneous Proceedings of 29th April 1857, No. 62).

Board's Proceedings.

Different if fractional proprietors enter into separate engagements with *patnidar*.

Board's Proceedings.

Registration under Act VII, B. C. of 1876, essential.

It should be observed that, although it is the proprietors of entire estates only who have a right to bring *patni* tenures to sale, the general law as to the rights of co-sharers is none the less applicable. Registration of name under Act VII, B. C., of 1876, is, of course, absolutely necessary before any relief can be sought by a proprietor under the *Patni* Regulation. Observe that this relief can be sought only by the zamindar against the *patnidar* and not by any other person other than the zamindar. *A*, a zamindar, purchased by private sale a *pargana*, of which some villages had already been let in *patni* by the former proprietors, and the other villages were in *khas* possession. He executed a deed by which he created, in favour of *B*, a *patni taluk* of the villages in *khas* possession, and by the same instrument he gave *B* a *sarbarakari* lease of all the *patni mahals* previously created. The deed reserved certain rents and declared that the two interests thus created should be inseparable, and that *B* should have no power to transfer the one without the other. But it was declared that the whole united interest was transferable, and that on any default being made by *B* in payment of the reserved rent, *B's* interest should be liable to sale under this Regulation. On *B's* applying to bring the *patni* tenures to sale for arrears, the Collector held that *B* could not do so, as he was neither the authorized agent of *A* nor was he (*B*) the zamindar. The Board, on appeal, *held* that, under this section, no other person than the zamindar, as defined in this Regulation, can exercise the right of causing a *patni* tenure to be sold. In the proceedings the zamindar (subject to the ordinary rights and obligations of principal and agent) may be represented by an agent acting on his behalf, but by no one else. But as *B* did not profess to have been authorized to act as such agent on behalf of the zamindar, but claimed to be vested with the right of causing such tenures to be sold on his (*B's*) own behalf, the zamindar having divested himself of his rights in that respect and transferred them to *B*, the appeal was rejected. It was observed that the right in question is inherent in the position of zamindar and cannot be exercised against the *patni* by any person other than the zamindar (Board's Miscellaneous Proceedings of 10th March 1882, No. 166, Collection 7, File 3124 of 1882). Every application, under section 8, Regulation VIII of 1819, should be referred on receipt to the record-keeper for report, and it should be acted upon only if the record-keeper reports that the applicant is the recorded proprietor of the estate (*see* Board's Manual, s. VIII, part III, p. 114).

Zamindar alone entitled to take steps under the Regulation.

Board's Proceedings.

Application to be referred to the record-keeper.

Board's Rules.

Who should the zamindar proceed against?—Where a zamindar brought a *patni* to sale for arrears of rent without recognizing all the co-sharers of the *patni*, it was *held* that, where an arrear of rent is due, the zamindar, in applying to the Collector to bring the property to sale, need not recognise any one except the registered *patnidar*, and that the mere fact that, in the application to the Collector, he did mention the names of one or two of the parties in possession, though not registered in the zamindari books, and omitted to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid (*Raghab Chunder* v. *Brojo Nath*, 14 W. R., 489). So also in *Rajnarain Mitra* v. *Ananta Lall Mundul* (I. L. R., 19 Cal., 703), where two of the recorded *patnidars* were dead before proceedings under the Regulation to set aside a *patni* sale were taken, it was *held* that that fact was immaterial and that the proceedings were not illegal by reason of their

Zamindar need proceed only against recorded tenant.

having been directed against dead persons: Proceedings under the *Patni* Regulation taken for the realization of arrears of *patni* rent are, it was observed, not taken against persons at all, but against the *tenure*. The zamindar was, therefore, quite right in setting out in his petition and notices the name of the *patni* and the names of the *patnidars* as recorded in his books.

Petition need be made to Collector only now.

To whom should the application be made.—Zamindars in applying for sales of *patni* tenures for arrears of rent were required to present a petition to the Civil Court of the district and a similar one to the Collector; but on the passing of Regulation VII of 1832, no petition was made in several cases to the Civil Court, and the Sadar Court ruled in 1849 that both petitions were still necessary, notwithstanding the transfer of the duties immediately connected with the sales themselves from the Judge to the Collector. To legalise past sales, Act XXXIII of 1850 was passed under which one petition only to the Collector is deemed sufficient. (Board's Miscellaneous Proceedings of 16th August 1850, No. 47). Although section 16, Regulation VII of 1832, by which the power of holding *patni* sales was transferred from the Civil Court to the Collector, has been repealed by Act X of 1861, the power to order sales is still vested in the Revenue officers under Act XXXIII of 1850, provided all the preliminaries under clause 2 of this section have been observed (Board's Miscellaneous Proceedings of 26th June 1863, No. 28). There was, however, some doubt as to the exact effect of the repeal of section 16, Regulation VII of 1832. This doubt was set at rest by Act VIII (B. C.) of 1865, section 3 of which lays down that the sale for the recovery of arrears of rent of *patni taluks* and other saleable under-tenures of the nature defined in clause 1, section 8 of Regulation VIII of 1819 shall be conducted by the Collector of Land Revenue in whose jurisdiction the lands lie (*see post*).

Board's Proceedings.

One petition only necessary.

One petition only need be presented for the sale of any or all of the tenures, described in section 8, clause 1, Regulation VIII of 1819, contained in one estate. These sales are conducted by the Collector of land-revenue under section 3, Act VIII (B. C.) of 1865. *See* Board's Manual, p. 113.

Board's Rules.

Sale at the beginning and middle of the Fasli year valid where that era prevails.

Date of the Presentation of the Petition.—A reference was made to the Board by a Commissioner as to whether in a district, where both the *Amli* and *Fasli* years are used, it is legal to advertise *patni taluks* for sale on the 1st of *Aswin* and *Cheyt*, instead of on the 1st of *Bysack* and *Kartik* in those *parganas* where the *Fasli* era is current. The Board, after enquiring what months were mentioned in the *patni* engagements of the district and what the practice had been as to the time of sale since the passing of the Regulation, *ruled* that, reading the Preamble in connection with cl. 2 of s. 8 of Regulation VIII of 1819, as it was clearly the intent of the law that sales of *patni taluks* should be held at the beginning and middle of the year, so in a district, where the *Fasli* year prevails, the selling at the beginning and middle of the *Fasli* year is within the meaning of the law. (Board's Miscellaneous Proceedings of 29th July, 1840, No. 46). The same view has been taken by the High Court. In *Pitambar Panda* v. *Damodar Dass* (24 W. R., 129), Pontifex, J., observed:—

Board's Proceedings.

The same view has been taken by the High Court.

"We are of opinion that the essential words in cl. 2, section 8 of the Regulation are the words 'at the commencement of the following year,' and that those words may be read with reference to Regulation VII of 1799, s. 15, cl. 7, which is referred to in the first section of Regulation VIII of 1819 by the words 'in-

stead of only at the end of the Bengal year as heretofore allowed by the Regulation in force.' The Regulation of 1799 expressly mentions the Bengal, *Fusli* and *Velaity* years, and authorises an application for sale to the Dewany Adalut at the commencement of the ensuing year.....We are of opinion that the intention of the Regulation was to lay down a uniform practice in each locality. That uniformity was the essential requirement and the particular date only the form for enforcing regularity, and that a practice which has been established for a course of years, and which can cause no substantial detriment to any of the parties concerned, and which is reasonable and convenient in itself, is not liable to objection on a mere point of form. We observe that in a letter on the record from the Secretary to the Board of Revenue to the Revenue Commissioner of Cuttack, dated 25th July, 1840, it is laid down that 'in a district where the *Fusli* year prevails the practice which, it appears, has universally obtained of selling at the beginning and the middle of the *Fusli* year is within the meaning of the law.' We are of opinion that this is the reasonable interpretation of the Regulation.''

Nor is the precise date mentioned in the Reg. essential.

Nor is it necessary that the petition should be presented on the precise date mentioned. In *Ashanullah Khan Bahadur* v. *Hari Charan Mazumdar* (I. L. R., 20 Cal., 86), it was *held* that the non-presentation of the petition on the precise date (1st *Kartik*) specified in cl. 3, s. 8, is not a substantial process to be observed by the zamindar previous to a sale for arrears of rent and affords no ground for setting aside the sale, that portion of the section being merely directory. If the 1st *Bysak* or the 1st of *Kartik* fall on a Sunday or other close holiday, the petitions prescribed in clauses 2 and 3 of s. 8 of Regulation VIII of 1819 must be presented on the first succeeding day on which the office is open (See Board's Manual, Part III, section viii, p. 114).

Board's Rules.

What should the petition contain.—The petition should specify any balances that may be due to the zamindar on account of the expired year from all or any talukdars or other holders of an interest of the nature described in cl. 1 of this section. Where, therefore, a settlement was made by a lease, which included certain *jote jamas* as well as certain *patni taluks* and reserved an aggregate rent for the whole without apportioning any portion of rent to the *jote jamas* as distinguished from the *patni taluks*, it was *held* that, as the landlord would not be able to comply with one of the conditions precedent to a sale under the Regulation contained in s. 8, *viz.*, to specify how much of the arrear was attributable to the *jote jamas* and how much to the *patni taluks* because the rent was one aggregate rent both for the *patni taluks* and for the *jote jamas*, Regulation VIII of 1819 could not apply to the settlement, and that the *patni taluks* could not be sold under the provisions of that Regulation in spite of the fact that the parties contracted that the Regulation should apply (*Hayes* v. *Rudranund Thakur*, I. L. R., 33 Cal., 381).

Specification of balances.

Inclusion of interest and cesses.

The Board have laid it down as an instruction to all Commissioners and Collectors that the practice which has hitherto generally prevailed of including interest and cesses in the petitions filed under this section should be allowed to continue. The recovery of these demands under the Regulation must be held to be admissible by the Revenue Authorities, unless and until the Civil Court decides otherwise. This order was circulated with the Board's Memo. No. 838½A, dated the 15th November, 1901.—(Board's Sales Proceedings of 16th November, 1901, No. 182, Collection 2, File 83 of 1901).

Board's Proceedings.

What should the notices under clauses 2 *and* 3 *contain.*—Observe that the notice required by cl. 2, s. 8, ought to state that, if the full amount due and specified in the notice be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form, it must contain, not only a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited. In the case of the notice under clause 3, it must be stated clearly that the sale might be stayed by payment of so much as would reduce the arrears to a quarter of the total demand of the zamindar. A notice under cl. 3 which contained a distinct statement that the sale would take place, unless the whole of the balance was paid, as if the zamindar was proceeding under cl. 2, was held to be a bad notice and a non-compliance with a substantial requirement of the Regulation, such as to justify the reversal of the sale. (*Ahsanulla Khan* v. *Hari Charan Mozumdar*, I. L. R., 17 Cal., 474). "The object of the publication of this notice," observed the Judges in this case, "is to give not only to the defaulting *patnidars*, but also to *darpatnidars*, mortgagees and other incumbrancers, notice of the sale. It may well be that the *patnidars*, *darpatnidars*, mortgagees or other incumbrancers would have available, for the purpose of saving the estate from sale, 75 per cent. of the arrears due, but not the whole. We are of opinion that, if the zamindar wishes to bring into operation the provisions of cl. 3, s. 8, and to get a half year's rent by means of this Regulation, he must strictly comply with the conditions laid down in the section. We think all the requirements in cl. 2 of s. 8 must be imported into cl. 3 of that section *mutatis mutandis*, and therefore we think that the serving of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property." This case went on appeal to the Privy Council, and their Lordships, while confirming the decision of the High Court, observed that the objection to the notice being defective, which was fatal to the whole proceedings and appeared on the face of it, may be competently raised for the first time in the Appellate Court (see I. L. R., 20 Cal., 86). The notice in both cases should also specify the lots which should be called up successively for sale. Where the notice contained no such order, it was *held* not to be in proper form (*Bejoy Chand Mahtap* v. *Atulya Chandra Bose*, I. L. R., 32 Cal., 953).

Notice under cl. 2.

Notice under cl. 3.

Notice should specify lots.

Publication of the petition.—The publication of the petition to the Collector, containing a specification of the balance of rent due, by sticking it up in some conspicuous part of the cutcherry as required by cl. 2, s. 8 of the Regulation, is not a substantial process to be observed by the zamindar previous to a sale for arrears of rent; non-compliance with that povision, therefore, is not a ground for setting aside the sale. No injury could result to the *patnidar* or any one holding under him by the non-publication of this petition, which is only a method prescribed by the Regulation for putting the executive machinery in force. (*Ahsanulla Khan Bahadur* v. *Hari Charan Mozumdar*, I. L. R., 20 Cal., 86). Observe, however, that the original peti-

Publication of petition not a substantial process to be observed by the zamindar.

tion and the original notice must be stuck up and published. In *Bejoy Chand Mahtap* v. *Atulya Chandra Bose* (I. L. R., 32 Cal., 953) where certified copies of the petition and the notice were stuck up instead of the original ones, this was *held* to be a material irregularity vitiating the sale.

Publication of notices essential for the validity of the sale.

Publication of the notices of sale.—Publication of the notices of sale under clauses 2 and 3 intimating that, if the amount claimed be not paid before the 1st of *Jayte* or the 1st of *Aughan* following, the tenure of the defaulter will be sold by public auction is, however, a condition precedent to the sale of a *patni* for arrears. If a *patni* is sold without such notice, the sale is informal and can be set aside, the *bonâ fides* of the purchaser notwithstanding. (*Moborak Ali* v. *Amir Ali*, 21 W. R., 252). "The petition, it is true," observed Petheram, C. J., in *Rajnarain Mitter* v. *Ananta Lall Mandal* (I. L. R., 19 Cal., 703), "does not affect the purchaser, or intending purchaser, in any way, but the notice does. The notice is a notice of what lots are to be sold, and when the sale takes palce; it is upon that notice that the lots are sold and it shows the order in which the lots will be sold, and is the very thing which the public ought to have access to, and which the public ought to be in a position to see."

Places where the notice should be published.

On the application to the Collector being admitted, the notice of sale has to be published at three places, *viz.*, (1) at some conspicuous part of the Collector's cutcherry; (2) at the Sudder cutcherry of the zamindar himself; and (3) at the cutcherry, or at the principal town or village upon the land, of the defaulter. The first two notices may be general ones containing the names of more than one defaulter. The third is a special one for the individual.

Original petition and original notice must be stuck up.

Publication at the Collector's cutcherry.—The orginal petition and the original notice must be stuck up and published. In *Bejoy Chand Mahtap* v. *Atulya Chandra Bose* (I. L. R., 32 Cal., 953), certified copies of the petition and the notice were stuck up instead of the original ones, and this was held to be a material irregularity vitiating the sale. "Having regard to the provisions of the second clause of s. 8," it was observed, "it was the original petition and the original notice which ought to have been stuck up, for s. 10 of the Regulation says that, at the time of the sale, 'the notice previously stuck up in the cutcherry shall be taken down'—apparently meaning the notice stuck up in some conspicuous part of the cutcherry as provided in s. 8, which means the notice itself and not a copy of it." It must be stuck up on some conspicuous part of the Collector's cutcherry and of the zamindar's cutcherry or the sale will be set aside (*Baikantha Nath* v. *Mahtab Chand*, 9 B. L. R., 87; 17 W. R., 447). In *Rajnarain Mitter* v. *Ananta Lall Mandal* (I. L. R., 19 Cal., 703), where a notice of sale, instead of being stuck up and published in some conspicuous part of the Collector's cutcherry as required by law, was, in accordance with the practice which prevailed during the incumbency of the Nazir of the Collector's cutcherry at Suri and of his predecessors in office, kept by the Nazir with other petitions for sale and notices relating to them in a bundle, which was at night locked up for safe custody and in the day time kept in a conspicuous place near his seat at the entrance to the cutcherry, any person who chose to ask for it and wished to see it being at liberty to inspect the whole bundle, it was *held* [*per* Petheram, C. J., and Ghose, J., (Tottenham, J., dissenting)]

Notice must be stuck up at some conspicuous place.

that this was not a publication of the notice within the meaning of cl. 2, s. 8, of the Regulation and that it was a 'sufficient plea' for the defaulting *patnidars* within the meaning of s. 14 to have the sale set aside. Petheram, C. J., observed :—"As it seems to me, the meaning of that (*i.e.*, the direction given in cl. 2, s. 8) is that the petition and the notice are to be advertised, and as to that it is material to notice that in s. 10 of the same Regulation the word 'advertise' is actually used which strongly confirms my view that the meaning of sticking up in a conspicuous part of the 'cutcherry' is that it is to be advertised in the ordinary acceptance of the word. Now 'advertise' in the ordinary acceptance of the word, means placing it in such a position that persons who have to use the place for their ordinary business may see it. It is clear that if the petition is put in such a place that only those who ask for it may see it, it is not advertised in any sense whatever.... It seems to me that when one has come to the conclusion that this notice was not published or advertised in the Collector's cutcherry, the judgment of the Privy Council in the case of *Maharajah of Burdwan* v. *Tara Sundari Debi* (I. L. R., 9 Cal., 619) concludes the matter, because they say that this is to be strictly complied with, and they point out that the zamindar is to be exclusively responsible for the strict performance of it. One argument which has been pressed before me is that the zamindar is responsible for what takes place in the mofussil, but is not responsible for what takes place in the Collector's cutcherry. I think that argument cannot be sustained."

Sticking up of the notice during the office-hours sufficient.

Section 10 (see *post*) of Regulation VIII of 1819 would seem to imply that the notice is to remain until it should be taken down at the time of the sale. When the notice and the petition were stuck up every day at 10 A.M. and taken down at 5 P.M. and they were not stuck up at all on Sundays, it was *held* that the procedure was not justified by the Regulation (*Bejoy Chand* v. *Atulya*, I. L. R., 32 Cal., 953). This view has, however, been dissented from in the case of *Sachi Nandan Datta* v. *Maharaj Bejoy Chand Mahatab Bahadur* (11 C. W. N., 720), where, in a suit to set aside a sale held under the Patni Regulation, it was found that the notices had been stuck up in the Collector's Office Board outside the Court from 10 A.M. to 5 P.M. and had not been put up at all on Sundays, and it was decided that this was a sufficient compliance with the Regulation. The case of *Bejoy Chand Mahatap* v. *Atulya Charan Bose* (I. L. R., 32 Cal., 953) was referred to in this case and the Judges observed :—"The head-note to the report is misleading, as it transposes the order of the remarks made by the learned Chief Justice and suggests that it is laid down as a definite finding that the procedure was not justified by the Regulation. That is not the view we take of the passage. The decision of that case turned on other irregularities which were held by the learned Chief Justice to be in contravention of the terms of the Regulation and to afford sufficient grounds for setting aside a sale. The passage at the end of the judgment does not amount to a distinct finding of any irregularity in consequence of which the sale was set aside; but it is clearly an expression of opinion by way of *obiter dictum* as to what might possibly be the effect of the failure to keep the notice stuck up on the Collector's notice board after office-hours. We do not think, therefore, that we should take that expression of opinion as binding on ourselves in this case, and we think that the procedure that was followed, namely, sticking out these notices during office-

hours was a sufficient compliance with the terms of the Regulation." The notice must be stuck up up to the date of the sale. Where the notice was stuck up only till the 14th May, although the sale did not take place until the 15th, it was *held* to be in contravention of s. 10 of the Regulation (*Bejoy Chand* v. *Atulya*, I. L. R., 32 Cal., 953).

Notice must be stuck up up to the date of sale.

Due publication of notice essential.

Publication at other places.—It is essential to the validity of a sale, held under Regulation VIII of 1819, of a *patni* estate for arrears of rent that the notices of sale prescribed by cl. 2, s. 8, should be duly and regularly published as therein directed (*Baikantha Nath* v. *Mahtab Chand*, 17 W. R., 447 : 7 B. L. R., 87). In cl. 2, the words "similarly published" mean that the notice is to be stuck up, as appears from the previous words of the section, in the cutcherry, or, if there be no cutcherry, in the principal town or village upon the land, of the defaulter (*Raghab Chandra Bannerjee* v. *Brojo Nath Kundu Chowdhury*, 14 W. R., S. C., 489). A zamindar brought a *patni* to sale for arrears of rent. His peon, who could neither read nor write, went to the village and, finding that there was no cutcherry there and that the *gomastha* was absent, opened the notice given to him and showed it to 5 or 6 people who were sitting there, none of whom could read or write. He then proceeded to the Thana, and obtained from the Head Constable a certificate on the back of the said document to the effect that he made such and such a statement of the publication of the notice. *Held* that the publication of the notice was not such as is required by law: The notice should be stuck up in the cutcherry, or, if there be no cutcherry, in some conspicuous part of the principal village upon the land of the defaulter, the object of the notice being not merely to give information to parties wishing to purchase, but to give information to the defaulter also that, unless the arrears be paid by a certain day, the property will be sold. (*Raghub Chunder Bannerjee* v. *Broja Nath Kundu Chowdhury*, 14 W. R., S. C., 489).

Publication must be at the cutcherry or the principal town or village on the land of the defaulter.

Personal service not sufficient.

Personal service of the notice is not a sufficient compliance with the provisions of cl. 2, s. 8 of the Regulation. In *Gouri Lall Sing* v. *Judisthir Hazra* (I. L. R., 1 Cal., 359) which was a suit brought to set aside a *patni* sale under Regulation VIII of 1819, it was proved that the notice of sale was stuck up first in the cutcherry of the *ijaradar* (the *mahal* having been let out in *ijara* by the *patnidar*), and, on the refusal of the *ijaradar's gomastha* to give a receipt of service, it was taken down, and subsequently personally served on the defaulting *patnidar* at his house, which was at some distance from the *patni mahal*, and it was *held* that, though the provisions of Regulation VIII of 1819 had not been strictly complied with, yet as the plaintiff (the *patnidar*) did not allege that, in consequence of the defective publication, there was not a sufficient gathering of intending purchasers, nor that the under-tenants were ignorant of the sale and were prejudiced by such ignorance, nor that the *mahal* was sold below its value, the defect did not amount to a "sufficient plea" under section 14 for setting aside the sale. This decision, however, has been overruled by subsequent cases. In *Govind Lall* v. *Chand Haree* (I. L. R., 9 Cal., 172) it was *held* that cl. 2, s. 8 of Regulation VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutcherry of the zamindar, is not complied with by serving it upon the defaulter himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and raiyats and the residents

of the place that the *patni* shall be sold if the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutcherry, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale. "If the notice only intended," observed the Judges, "to convey private intimation to the defaulter or his agent, the law would have hardly used the word 'published'. To publish, in our opinion, is to make public, *i.e.*, to convey information to the public or all whom it may concern." In *Mahamad Zamin* v. *Abdul Hakim* (I. L. R., 12 Cal., 67), again, where the plaintiff, who was the defaulting *patnidar*, objected to the sale of his *patni* on the ground, among others, that the notice had not been given in accordance with s. 8 of the Regulation inasmuch it had not been posted at the cutcherry of the defaulter, and where there was no evidence of service at the cutcherry, but there was evidence of service upon the defaulter personally, it was *held* that this was not sufficient and that the sale must be set aside. So also in the case of *The Maharajah of Burdwan* v. *Kisto Kamini Dassi* (I. L. R., 9 Cal., 931), where the serving peon gave the notice to one of the *amlas* of the cutcherry in the presence of the defaulting *patnidar* and obtained a receipt, it was *held* that there was no proper service. Where, however, the *patni* was not a distinct *mauza* or a collection of *mauzas*, but a small piece of land upon which there was no town, or village, or cutcherry of any kind, and the peon stuck up the notice in the Collector's office, and also at the sudder cutcherry of the zamindar, and obtained the receipt of the defaulter at the latter place, he was held to have observed substantially, as far as he could, the provision of the law regarding notice, it being impossible to carry out literally the words of the Regulation in that respect. (*Harry Kisto Roy* v. *Motee Lall Nundee & others*, 14 W. R., 36.)

But sufficient if there is no cutcherry or principal town and village on defaulting patni.

As to the 3rd notice, the words "the land of the defaulter" probably mean the land of the *patni* in arrear (*Lutfanissa Begam* v. *Kowar Ram Chandra*, Suddur Dewani Report for 1849, p. 371). It was doubtful, however, whether the cutcherry, which is one of the places at which the notice should be published, must be upon the land of the defaulter which is the subject of default. In several cases it was held that the cutcherry referred to in the section need not be the cutcherry on the *patni* in arrear. Thus in the case of *Lutfanissa Begam* v. *Kowar Ram Chandra* referred to above the Sudder Diwani Adalat expressed an opinion that the cutcherry of the defaulter may be any cutcherry in which the collections of the tenure are made. Similarly in *Mungazee Chuprasi* v. *Shiba Sundari* (21 W. R., 369), where it was found that the notices at the Collector's office and the zamindari cutcherry had been duly published, but that the notice, required by cl. 2, s. 8 of Regulation VIII of 1819, to be served at the cutcherry of the defaulter had been served at the cutcherry of an adjoining *taluk*, at which cutcherry the business of the *patni* in arrear was conducted, it was *held* that so long as the cutcherry at which the notice on the defaulter, as required by s. 8, cl. 2, Regulation VIII of 1819, is served is an adjacent one, in which the business of the defaulting *patni* is carried on, and is on land belonging to the defaulter, publication at that cutcherry is a sufficient publication. "We were at first inclined to hold," observed Glover, J., "that the words of the section 'to be similarly published at the cutcherry, or at the principal town or village upon the land

Notice must be served on *patni* in arrear.

And at the cutcherry on the *patni* in arrear.

of the defaulter' made it operative that the cutcherry at which the notice was to be served (where it was served at a cutcherry) should be upon the land which was the subject of the default; but the meaning of the sentence is not absolutely clear. The comma after the word cutcherry gives, no doubt, considerable strength to the argument of the defendant that the cutcherry need not be on the land which is the subject of default, but may be on any other land, the property of the defaulter. And there is a decision of the late Sudder Court—*Lutfanissa* v. *Kowar Ram Chandra & others*, S. D. A. Decisions for 1849, p. 371—in which the same construction of the section is declared. I do not desire, therefore, to uphold my first impression, especially as it is deferred to the opinion of my learned brother Kemp. At all events I am prepared to hold with him so far that, so long as the cutcherry at which the notice on the defaulter, as required by the Act, is served, is an adjacent one, in which all business of the defaulting *patni* is carried on, and is on land belonging to the defaulter, publication at that cutcherry is a sufficient publication—the object of the law being to give information to the tenant in arrear." In *Hanooman* alias *Nona Bibi* v. *Bipro Charan Roy* (20 W. R., 132), again, where it was found that the notice was affixed not at the cutcherry of the defaulter, but at the house of his *gomastha*, where the latter used to transact business except when the zamindar came to the village, and that even then the zamindar would frequently transact business at the *gomastha's* house and not at the cutcherry which was in the same village but in a ruinous state, it was *held* that, considering what a cutcherry is in a village in Bengal, and considering what the object of the Regulation was, *viz.*, to ensure the publication of the notice to the defaulter or to his manager, it would be and was an infinitely more exact compliance with the spirit of the law to serve the notice at the place in which the defaulter's *gomastha* was transacting, and did habitually transact, business than to serve it at an empty and ruinous building. If it had appeared, observed the Court, that the building, denominated the cutcherry, had been in daily use, and that the records and the papers of the *mahal* were there, and that the servants of the defaulter were on that spot transacting their business there, then it may be admitted that the house of the *gomastha* for the time being could not be properly considered a place where the notice might be served under the Regulation; but under the circumstances of the case, the house where the *gomastha* resided may fairly be regarded as the cutcherry for the time being. This view has, however, been overruled in the case of *The Maharajah of Burdwan* v. *Kisto Kamini Dassi* (I. L. R., 9 Cal., 931). In that case a suit was brought to set aside the sale of a *patni taluk* under Regulation VIII of 1819, and one of the grounds, relied upon by the plaintiff, was that the notice of sale had not been duly published, there being no sufficient compliance with the provision of s. 8, which requires that "a copy of the notice shall be sent to be similarly published at the cutcherry, or at the principal town or village upon the land of the defaulter." The *patni taluk* in question was called Lot Amarpur, and, as the defaulting *patnidar* had other properties in the neighbourhood of that *taluk*, he had a small *mal* cutcherry on the land of this *taluk*, and another *dihi* cutcherry at a village, called Mahanad, some 8 or 9 miles off from Lot Amarpur. At this latter cutcherry all his principal business was transacted, including that of Lot Amarpur, and it appeared

that two *darpatnidars*, who were the largest tenants of Lot Amarpur, were always in the habit of paying their rents at the *dihi* cutcherry. The other cutcherry within the *taluk* was used for the purposes of receiving rents of the smaller tenants, which, when received, were paid into the *dihi* cutcherry at Mahanad. The notice in this case was taken to the Mahanad cutcherry, and the serving peon gave it into the hands of one of the *amlas* at the cutcherry in the presence of the defaulting *patnidar* and obtained a receipt. It was contended that the "cutcherry" referred to in the section meant the nearest large cutcherry at which the business of the landlord is usually carried on. *Held* by the Full Bench that the notice in this case was insufficient. If, the Judges said, there is a cutcherry upon the land of the defaulting *patnidar* (by which expression is meant the land of the *taluk* in question which the zamindar is seeking to sell for default of rent), the copy, or extract of such part of the notice of sale as may apply to the tenure in question, must be published at that cutcherry. If there is no such cutcherry, the copy or extract must be published at the principal town or village within the *taluk*. The mere delivery of the notice to the *patnidar* or to one of his *amlas* is not sufficient: It must be published in the manner required by the section. The case went on appeal to the Privy Council (I. L. R., 14 Cal., 365) and their Lordships, while confirming the decision of the Full Bench, observed:—"To hold otherwise might defeat some of the substantial objects of this Regulation. It appears from the preamble that one of the objects is to establish 'such provisions as have appeared calculated to protect the under-lessee from any collusion of his superior with the zamindar or other for his ruin, as well as to secure the just rights of the zamindar on the sale of any tenure.' And immediately afterwards occurs the statement that it has been deemed indispensable to fix the process by which the said tenures are to be brought to sale. The object of directing local publication of notices is to warn the under-lessees of the contemplated proceedings which may result in sweeping away their property, and also to act as advertisements to persons who may bid at the sale. Both these objects might, and in many cases would, be frustrated if it were sufficient to publish notice at any cutcherry which the *patnidar* may happen to possess, however distant it may be, or to serve it personally on the *patnidar*."

Signature of three substantial persons necessary.

Attestation by substantial persons.—The third notice is required to be served in the mofussil by a single peon "who shall bring back the receipt of the defaulter or his mofussil agent, or, in the event of his inability to procure this, the signatures of *three substantial persons*, residing in the neighbourhood, in attestation of the notice having been brought and published on the spot." The question as to who are "substantial persons" competent to attest the notice deserves notice. In a suit which was brought for the reversal of a sale of a *patni taluk* on the ground that the notice, required by cl. 2, s. 8, Regulation VIII of 1819, had not been duly served, and that, although the parties attesting the service of the notice of sale were sufficient in number, they were not, with the exception of the *Mondal*, what are called substantial persons, one being the *chowkidar* of the village and the other a *ticca* tailor, the High Court observed:—"The word used in the Regulation is 'substantial,' meaning of course men who have some stake in the community, men of local influence or importance or respectability. We think the law has been complied

Meaning of 'substantial persons.'

with on this point. One of the witnesses is a *Mandal*, the headman of the village; another is the *chowkidar*, an official whose attestation is always considered as the best possible in all matters connected with service of notice. The third appears to be a tailor residing temporarily at a place, but who lives in the neighbourhood. The man is declared to be not a proper witness. We do not see why the man is not to be considered competent to attest the service of notice. He appears to be a respectable man, though not a rich one; and besides, the phrase 'substantial,' on which the special appellant lays so much stress, must be taken comparatively. In a small village the measure of a 'substantial' witness will of course be much lower than in a place of importance." (*Gopal Krishna Soor* v. *Madan Mohan Haldar*, 2 W. R., 188). A review was subsequently granted in this case, and the High Court reversed their judgment. They said:—"It is contended by the learned counsel for the applicant for review that the law requires that the attesting witnesses must be substantial, that is to say, responsible, moderately wealthy men, against whom in a case of false attestation the party injured may have his remedy in a suit for damages. Now in this case the attesting parties are sufficient in number and they reside in the neighbourhood, but, with the exception of the *Mandal*, the rest are not what can be called substantial persons. One is the *Chaukidar* and the other a tailor. The Legislature invested the zamindar with the power of bringing subordinate *patnis* to sale, and made him exclusively answerable for the due observance of the prescribed processes under which tenures could be brought to sale. To protect the *patnidar* from fraud it was enacted that the notice of sale must be attested by three substantial persons. Now, it is clear that, unless the attesting parties answer to the common meaning to be put upon the word 'substantial', the *patnidar* would be wholly without remedy in case of false attestation. If, as contended by Mr. Doyle (for the Resp.), the word 'substantial' means simply men who could be found, it would be sufficient to have enacted that the notice must be attested by 3 persons 'residing in the neighbourhood'; the word 'substantial' was wholly superfluous." This case went on appeal to the Privy Council under the title of *Ram Sebak Bose* v. *Monmohini Dassi* (L. R., 2 I. A., 71; 23 W. R., 113), and their Lordships were of opinion that this was too limited a view. "It is, no doubt, desirable," they observed, "that men of property should sign these receipts if they can be obtained, but wealth is only one element in the position and status of the witness, and if he lives in the neighbourhood, and if he be a respectable man and be of good character, their Lordships see no reason why, upon evidence appearing of such facts (of which the Judge in each case may satisfy himself), the Judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to show that the man objected to, carried on the trade of a tailor, that he had *lakhiraj* lands, that he lived in the neighbourhood, was well-known, and was (to use a description built up of many circumstances) a 'respectable' person." Their Lordships therefore considered the first judgment more correct than the last given on review which they accordingly reversed. A "substantial" person is, therefore, a respectable person of good character, such as a *Mondal*, a *chaudkidar* or a holder of *lakhiraj* lands. He must reside in the neighbourhood.

A substantial person a respectable person of good character. He must live within a short distance of the cutcherry.

This, however, does not make it imperative that he should be a resident of the village, but may be taken to include men living within a short distance of the cutcherry (*Mohinee* v. *Juggobondhu*, Spl. W. R., 382).

Certificate must be obtained.

Certificate to be obtained by the peon.—In case the people of the village should object or refuse to sign their names in attestation, the peon is required to go to the cutcherry of the nearest Munsif, or, if there should be no Munsif, to the nearest Thana, and there make an affidavit of due publication—*certificate to which effect* shall be signed and sealed by the officers there and delivered to the peon. In *Ahsanullah Khan Bahadur* v. *Haricharan Mozumdar* (I. L. R., 20 Cal., 86; 17 Cal., 474), the Judges observed that "certificate to this effect" in cl. 2, s. 8, means a certificate to the effect that the peon did come to the Munsif or Police-officer, as the case may be, and did make a voluntary oath as to the service of the notice. This provision of the section would be fully complied with if the peon goes before the Munsif or Police-officer and makes a deposition upon oath. If the Munsif appends at the foot of that deposition a statement to the effect that the deponent had that day made that deposition in his presence, that would be a certificate within the meaning of cl. 2, s. 8. And if the peon goes before the Munsif with an affidavit which has been prepared and sworn to, the jurat of the Munsif would be as much a certificate as if the peon had made a deposition on oath and the Munsif had recorded the fact of his having done so. (*Ibid.*)

Meaning of "Certificate to this effect."

Observance of formalities in the mode of service directory only.

Value of the verification of service of notice.—The proof of the service of notice is sufficient. The observance of special formalities in the mode of service or attestation by witnesses is merely directory. In *Sona Bibi* v. *Lall Chand Chowdhury* (9 W. R., 242), which was a suit to cancel a sale of an under-tenure under Regulation VIII of 1819, it was *held* that, where a Court finds that the notice prescribed in cl. 2, s. 8 of the Regulation has been duly served, it need not find whether the peon, who served the notice, had or had not duly complied with all the directions of the Regulation with reference to what should be done after the service in verification thereof. Peacock, C. J., observed:—"The material part of cl. 2, s. 8 of Regulation VIII of 1819, is that the notice required to be sent into the mofussil shall be served. The zamindar is exclusively responsible for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or, in the event of his inability to procure it, that he shall obtain that which is substituted by the Regulation for it, is merely *directory*, and, if not done, does not vitiate the sale, provided the notice is duly served." This decision was referred to by their Lordships of the Privy Council in the case of *The Maharani of Burdwan* v. *Kista Kamini Dassi* (I. L. R., 14 Cal., 365) and the principle laid down by Sir Barnes Peacock was explained as follows:—"The formalities which the zamindar has to observe, and the evidence by which that observance has to be proved, are two totally different things. All that Sir Barnes Peacock decided was that, if the observance of the requisite formalities was distinctly proved, it was not necessary to have the mode of proof which the Regulation directs. In the case of *Maharajah of Burdwan* v. *Tarasundari* (L. R., 10 I. A., 18; I. L. R., 9 Cal., 618) the Committee found that the question whether the requisite formalities had been observed depended

on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zamindar, whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir Barnes Peacock decide or intimate an opinion that one of the important formalities required as preliminary to a sale could be dispensed with." In *Bhugwan Chunder Dass & another* v. *Sudder Ali & others* (I. L. R., 4 Cal., 41), again, it was held that, although it was absolutely essential to the validity of a sale under the Regulation that the notice of such sale should be served in strict compliance with the directions given in s. 8, cl. 2, of Regulation VIII of 1819, the provisions specifying the manner in which proof should be given of the service of notice of sale are merely *directory* and non-essential. See also *Hanooman* alias *Nonna Bibi* v. *Bipro Charan Roy* (20 W. R., 132). In *Ram Sabuk Bose* v. *Kamini Koomari Dassi* (23 W. R., P. C., 113; L. R., 2 I. A., 71; 14 B. L. R., 394), which came up to the Privy Council in appeal from the decision of Kemp & Glove, JJ. (2 W. R., 188), their Lordships referred to the case of *Sona Bibi* v. *Lalchand & another* (9 W. R., 24) and, quoting the judgment of Sir Barnes Peacock (*vide ante*), remarked that "their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these *patnis* could be set aside, because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance." In a suit to set aside the sale of a *patni* for arrears of rent under Regulation VIII of 1819 on the ground that proper notices had not been sent, served and published under s. 8, cl. 2, the objection in order to succeed must be one of substance and not merely of form. The requirements of the Regulation as to the service of the *ishtahar*, and the signing of the receipt by substantial persons, may be held to have been substantially performed where the persons signing are such as are usually expected to attest such a document, persons who are treated with consideration, *e.g.*, *Ameens, Mukhtears and Chowkidars*. (*Pitambar Panda* v. *Damodar Dass*, 24 W. R., 129). In this case, as the circumstances showed that the *patnidar* had actual notice of the proceedings, the Judges did not think it necessary to look very strictly to the formal proof. They observed: "Although we think it very important that service of the notice should be strictly proved by the zamindar, and that the receipt should be signed by substantial men of the neighbourhood, who would be likely to bring it to the notice of the *patnidar*, we think the circumstances of this case are not such as to induce us to look very strictly to the formal proof if we believe, as we believe, that the Pandas had actual notice of the proceedings." (*Ibid.*)

But there must be proof that notices have been duly published.

There must, however, be clear proof that the notices have been duly published. The fact should not be left a matter of controversy. In a suit to set aside a sale of a *patni taluk* held under the provisions of s. 8, Regulation VIII of 1819, where there was no evidence one way or the other to show that the notice required by that section to be stuck up in some conspicuous part of the Collector's cutcherry had been published, it was

held that the plaintiff was entitled to a decree setting aside the sale (*Hurro-doyal Roy Chowdhury* v. *Mahamad Gazi Chowdhury & others*, I. L. R., 19 Cal., 699). In a suit brought to set aside a sale held under Regulation VIII of 1819, it appeared that the notification had been duly made at the Collector's cutcherry, and in the *sadar cutcherry* of the zamindar; but the question was, whether the notice required to be published on the land belonging to the defaulter had been duly given. The Lower Court, upon the evidence, found that it had, although the serving peon had not brought back the receipt required. The High Court, however, found that, there being no independent evidence that the peon had been entrusted with the service of the notice in question, and none, except his own, to show that he even went to the village, the due publication of the notice had not been proved. The case went on appeal to the Privy Council. Their Lordships *held* that, although objection to the form of the receipt and the absence of the receipt itself need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Bibi* v. *Lalchand Chowdhury*, 9 W. R., 22), yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zamindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming was correct. "Their Lordships desire," observed the Judicial Committee, "to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zamindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision, to which their attention was called, of Sir Barnes Peacock, when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not a matter of controversy, if the fact was ascertained that it was duly published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left a matter of controversy. The evidence should be secured immediately afterwards, and exist in writing and be referred to by the proper officer as part of the foundation of the sale. Accordingly, if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager signed under his hand, and, if he gets such a receipt, there is an end to all questions as to service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest Munsif, and make a voluntary oath of the fact of service, which act is immediately record-

ed, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved, and the fact is not left to be matter of controversy afterwards. The issue in this case is as to whether the provisions of Regulation VIII of 1819 have been complied with. The case before us differs from that before the Chief Justice of Bengal, and equally from the case which was before this tribunal, in this, that the fact of service here is a matter of controversy." (*Maharajah of Burdwan* v. *Tarasundari Debi*, L. R., 10 I. A., 18; I. L. R., 9 Cal., 618). The law on the subject has been well summed up in the case of *Bejoy Chand Mahtab* v. *Amrita Lall Mukherjee*, (I. L. R., 27 Cal., 308), where it was held that it follows from the decisions in the case of *Maharajah of Burdwan* v. *Tarasundari Debi* (I. L. R., 9 Cal., 619; L. R., 10 I. A., 19) and in the case of *Maharajah of Burdwan* v. *Kisto Kamini Dassi* (I. L. R., 14 Cal., 365; L. R., I. A., 20) that, if the fact of the due publication of the sale notice be not in controversy, be not the subject of conflicting evidence, and the only dispute is as to whether the statutory mode of proof of such publication was resorted to, then it is not incumbent upon the zamindar to show that the formalities prescribed by the Statute have been complied with, but that, if there be a conflict of evidence on the point, and the zamindar cannot show that the statutory method of proof prescribed has been followed, the decision must go against him, as it is his business to follow the prescribed method. Clause 2, s. 8, observed Bannerjee, J., in this case, "indicates indirectly, no doubt, that the notice is to be published, and then the serving officer is to make some *bonâ fide* endeavour to obtain the receipt of the defaulter or his manager; and it is only in the event of his inability to procure such receipt that the other modes of proof are to be resorted to. In saying this, I must not be understood to mean that the receipt of the defaulter or his agent is necessary, or that personal service of the notice on the defaulter is required. The law does not make personal service of notice on the defaulter necessary or sufficient. But it must be borne in mind that where there is a dispute as to the due publication of the sale notice, the question whether the serving officer made any *bona fide* endeavour to obtain the defaulter's or his agent's receipt in the first instance, as required by law, must have an important bearing upon the inquiry, especially where the point for determination is whether the alleged publication was real or colourable only. Of course, what would be a sufficient endeavour to obtain such a receipt must depend upon the circumstances of each case."

The law on the subject summed up.

Date by which notice is to be served.—Clause 2, s. 8 of the Regulation, lays down that the notice must be published at any time previous to the 15th *Bysak* in order that the sale may take place on the appointed day. The object of the law is that the defaulter should have full and timely notice of the zamindar's intention to sell the tenure for non-payment of rent. Looking to the terms of section 8, it was said in *Horo Nath Gupta* v. *Jagannath Roy Chowdhury* (11 W. R., 87), it is impossible to say that it was not a distinct and an obvious object of the Legislature to provide a sufficient notice to a defaulter before a sale took place of his tenure, 15 days' time (and not less) being considered sufficient; without such notice no sale could be a sale duly held under the law.

Notice must be published before the 15th Bysak.

Object.

The question as to whether the notices must be served *before* the 15th *Bysak* or, the 15th *Kartic*, as provided by the Regulation, was at first doubtful. In one case it was held that so long as the notice was served either previous to, or on the 15th, it was sufficient. In this case, *A*, a twelve-annas shareholder of a *patni* tenure, brought a suit to set aside a sale upon the ground, among others, that the notification of sale had not been published before the 15th *Bysak* as required by cl. 2, s. 8. The defendants were the zamindars and purchasers at the sale. The receipt for the service of the notice was dated the 15th *Bysak*, and was signed by 4 *Mondols* of the village, in which the plaintiff's *mal* cutcherry was situated. The serving peons deposed that they had served the notification of sale on the holder of the 4-annas shareholder on the 13th or 14th of *Bysak*, and that they went to the plaintiff's house on the same day, but found neither the plaintiff nor his servants there; that they went on the following day to the plaintiff's *mal* cutcherry and were unable to find the plaintiff or his *gomastha* or any other servant, and that they, therefore, sent for the village *Mondols*, read the notice to them and affixed it to the cutcherry, and obtained from them the receipt, dated the 15th *Bysak*. The sale took place on the 3rd of *Joistha*, 17 days later, and it was *held* that the fact that the receipt of the notice of sale was dated the 15th *Bysak* was not a sufficient ground for setting aside the sale of a *patni* tenure for arrears of rent. "In the receipt which has been read to us in this case," observed the Judges, "the particular time of publication is not stated. The receipt is dated the 15th, and has the signatures of 3 substantial persons.....It might very well be that the previous day or days had been spent in vain efforts to procure the signature of the *patnidar* or his agent, and that the receipt was afterwards completed by the signatures of the *Mondols*, obtained on the 15th *Bysak*, and this might well have satisfied the Collector that the notice had been in fact published previous to the 15th. That being so, and no injury to the plaintiff at all being made out, it appears to us that the ground set up is wholly insufficient to induce this Court to set aside the sale." (*Matangee Charan Mitter* v. *Mooraree Mohon Ghose*, I. L. R., 1 Cal., 175). This view was, however, overruled by the Full Bench in *Sarnamoyi Debya* v. *Girish Chandra Mozumdar* (I. L. R., 18 Cal., 363). In that case a *patni* was sold on the 2nd of *Aghran* 1293 under the provisions of Regulation VIII of 1819, the notices of sale having been published on the 15th *Kartik*, and the question referred to the *Full Bench* was "whether the publication of the notices relating to an impending *patni* sale, made on the 15th *Kartik*, *i.e.*, on a date later than that prescribed by law, is not a sufficient ground for setting aside a sale subsequently held, and whether, under the terms of s. 14, this was a sufficient plea for a reversal of that sale." The Full Bench *held* that the words "cause similar publication to be made" in cl. 3 mean a publication similar to that which is prescribed by the preceding cl. 2, and that the requirements in that clause, so far as the publication of the notice of sale is concerned, and the period at which it is to be published, must be imported into cl. 3 *mutatis mutandis*. The provision of cl. 2 that, where the notice has been served *previous to the 15th of the month*, there shall be a sufficient warrant for the Collector to sell the *patni* must, therefore, be incorporated in cl. 3 of the same section, so that it is when the notice has been published *previous* to the 15th of the month of *Kartik*

Notice must be published before the 15th Bysak or 15th Kartic.

that the Collector is authorized to sell. Non-compliance with such direction is, they said, a "sufficient plea" within the meaning of s. 14 of the Regulation for the reversal of a sale held thereunder.

This rule does not apply to notice affixed at the Collectorate.

Observe, however, that the provision as to the notice being stuck up before the 15th *Bysak* or 15th *Kartik* does not apply to the notice which is to be affixed at the Collectorate, but to the notice which is to be published in the mofussil. The question came up in *Sheik Niamat Ullah* v. *A. H. Forbes & others* (2 C. W. N., 459). There the notice of the sale that was affixed in the Collectorate was not published till the 18th *Bysak*, and it was contended that it should have been published there not later than the 15th Bysak, but it was *held* that the provision in s. 8 of Regulation VIII of 1819 requiring the notice of sale to be published before the 15th *Baisak* applies to the notice to be published in the mofussil, and not to the notice to be affixed at the Collectorate. The words in the section "the same shall then be stuck up in some conspicuous part of the cutcherry" do not mean that it must be stuck up either immediately or before the service of the other notices referred to in the section or at least before the 15th of *Bysak*, the word "then" not necessarily meaning immediately: It may mean "afterwards." It will be a sufficient compliance with the provision of the section if the petition be stuck up in a conspicuous part of the cutcherry within a reasonable time before the sale. "Having regard," said the Judges, "to the facts (1) that the law prescribes no definite time within which this petition must be stuck up, and (2) that the other notices were served in due time so as to give due notice of the sale, we cannot say that the publication of the petition on the 18th *Bysak* was not within a reasonable time of the sale."

Sale in such cases only voidable and not void.

Effect of defective services of notice of sale.—Notice that when a *patni* sale is impeached on the ground that the notices required by the Regulation have not been duly served, the sale is voidable and capable of reversal in a suit under s. 14 of the Regulation. The validity of the sale is affected by the failure of the zamindar to comply with the provisions of the Regulation as to the issue and service of the requisite notices and the sale is liable to be annulled in a suit instituted under s. 14, but the sale cannot be treated as a nullity (*Ramsona Chowdhurani* v. *Sonamala Chowdhurani*, 13 C. L. J., 404; 3 C. C. L., 658).

The sale must take place on the date advertised or any subsequent date after due notice.

Date of sale.—The sale on a proceeding at the end of the year takes place on the 1st of *Jeyt* following, but if that date falls on a Sunday or holiday, the next subsequent day, not a holiday, should be selected. Where a sale was advertised to take place on the 5th *Jeyt*, 1269, which date was erroneously stated in the sale notice to correspond with Saturday, the 17th May, 1862, whereas the 5th *Jeyt* was, in fact, Sunday, the 18th May, and the sale took place on Saturday, the 17th May, 1862, corresponding with the 4th *Jeyt*, the sale was held to be illegal in consequence of its not having taken place on the 5th *Jeyt* as advertised or on any subsequent day to which the sale might have been adjourned after due notice. Steer, J., remarked:—"Regulation VIII of 1819 speaks of the Bengalee month, and prescribes that the sale shall be held on a day in the month of *Jeyt*. The date of sale requires to be a Bengalee date, a day in *Jeyt*; an English date need not be given at all; and if it is given, it is not given as intimating that the sale shall be

made on that date, but merely to supply an English date corresponding with the fixed date in Bengalee. When, therefore, the Collector discovered, and he should most certainly have discovered it, that the 5th *Jeyt* was not the 17th May, and that the 5th *Jeyt* fell on a Sunday, he should have selected the next following open day; *viz.*, Monday, the 6th *Jeyt*, corresponding with the 19th May, for holding the sale. Instead of doing this, he proceeded to sell the *patni taluk* on the 17th May, or on the 4th *Jeyt*, that is, a day previous to the fixed day. Every sale requires, as conditions precedent to it, to be made at the place where the advertisement says it shall be held, and on the day advertised, or on any subsequent day to which the sale may be adjourned after due notice. To hold a sale on the 4th *Jeyt* which is advertised to be held on the 5th *Jeyt*, without any prior notice of change of date, is, in fact, to sell without notice and is no sale at all." (*Bacharam Mukherjee* v. *Issur Chunder & others*, Spl. W. R., 4).

Similarly the mid-year sale takes place on the 1st of *Aughan* and, if that is a close day, on the first opening day of the month. In both cases an interval of 30 days is allowed between the date of the application and the date of the sale. This practice is based on the authority of a decision of the late Sudder Court (*Woomesh Chandra Roy* v. *Esan Chandra Roy*, S. D. A., 1859, p. 1198).

Onus.—The zamindar is exclusively answerable for the observance of the forms prescribed for the publication of notice. The onus lies on the zamindar even if the plaintiff adduces no evidence in support of his plea of non-service. There is no presumption in favour of the zamindar of the notices having been duly served, and it is not even necessary for a plaintiff, who brings a suit to reverse a sale, to set out the grounds for impeaching the due publication of the notice. In a suit against a zamindar to reverse the sale of a *patni* tenure, held under Regulation VIII of 1819, on the ground of non-service of notice, it was *held* that the onus of proving service was "not improperly laid on the defendant (the zamindar) according to the spirit of s. 106 of the Evidence Act, *viz.*, that the fact was specially within the knowledge of the defendant, and the burden of proving the fact ought to have been upon him. The defendant was the zamindar, and was, under s. 8 of Regulation, cl. 2, burthened with the entire responsibility of serving the usual notices; and it was within his special knowledge whether such notice had been served or not." (*Durga Charan Surma* v. *Syed Najunooldin*, 21 W. R., 397). In *Maharajah of Burdwan* v. *Tarasundari Debi* (L. R., 10 I. A., 19; I. L. R., 9 Cal., 619), their Lordships of the Privy Council observed that the due publication of the notice, as prescribed by Regulation VIII of 1819, s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a *patni taluk* for non-payment of rent is exercised by the zamindar, who, when instituting the proceeding, is exclusively responsible for such publication being regularly conducted. So also in *Hurrodoyal Roy Chowdhury* v. *Mahamed Gazi Chowdhury & others* (L. L. R., 19 Cal., 699), it was *held* that it lies upon the defendant to show that the sale was preceded by the notice required by that sub-section, the service of which notices is an essential preliminary to the validity of the sale. In the case of *Rajnarain Mittra* v. *Ananta Lal Mundul* (L. L. R., 19 Cal.,

Onus lies on the zamindar

703), however, Tottenham, J., expressed a contrary opinion (Ghose, J., expressing no opinion), and remarked:—"The Lower Court placed that burden (the burden of proof in respect of the publication or non-publication of the notices) on the defendant zamindars, and held that they had not proved proper publication. The Lower Court gave no particular reason for relieving the plaintiff of this burden, but in this Court the vakeel for the respondents has supported this ruling by pointing out that the Regulation makes the zamindar exclusively answerable for the observance of the forms prescribed, and by reference to the authority of the cases of the *Maharajah of Burdwan* v. *Tarasundari Debi* (I. L. R., 9 Cal., 618), and *Mahomed Zamin* v. *Abdul Hakim* (I. L. R., 12 Cal., 57), and of an unreported case *Hurodayal Chowdhury* v. *Mahomed Ghazi Chowdhury* (I. L. R., 9 Cal., 699), decided lately by Pigot and Macpherson, JJ. The first two cases do not lay down that the plaintiff need not give *primâ facie* evidence of non-publication sufficient to require the defendant zamindars to prove the affirmative: and having regard to the general principle that a plaintiff is bound to prove his case and to the terms of s. 14 of the Regulation which is the law authorizing a suit to be brought to set aside a *patni* sale, I confess I do not see why the plaintiff should be relieved of the burden of starting his case. The Regulation entitles any person to sue the zamindar for the reversal of the sale, and, upon *establishing a sufficient plea*, to obtain a decree. Non-service of notice may be a sufficient plea, but to allege it is not of itself sufficient to establish it, and, if no evidence as to publication was adduced on either side, it seems to me that the plaintiff would not be entitled to a decree. The provision in s. 8, that the zamindar is exclusively answerable for the observance of the forms, means, I take it, that the Collector shall not be held responsible; and does not mean that, in a suit by the defaulter to set aside the sale on the plea of non-observance of the forms, he shall not be required to do more than allege that they were not observed." Observe that there is no analogy between the case of a sale for arrears of revenue and that of a *patni taluk*. In a suit to set aside a *patni* sale the burden of proving due publication lies entirely upon the zamindar, while, in the case of a revenue-sale, the burden of proving irregularity is on the party who impeaches the sale (*Sheo Rutan* v. *Nellall Shaha*, I. L. R., 30 Cal., 1; 6 C. W. N., 688). The plea of non-service or of informality of any particular notice may be taken at any stage of the suit and even for the first time in appeal (*Ashanulla* v. *Hari Charan Mozumdar*, I. L. R., 20 Cal., 86).

The plea of non-service may be taken at any time.

Sales how conducted.

9. All sales of saleable tenures applied for under the rules of this Regulation shall be made in public *cutcherry*; the land shall be sold to the highest bidder, and every one, not the actual defaulter, shall be free to bid, not excepting the person in satisfaction of whose demand the sale may be made, nor the under-tenants of the defaulter; fifteen per cent. of the purchase-money shall be paid immediately the lot is knocked down, and the officer conducting the sale shall be competent to refuse to accept a bid, or to knock down a lot to any bidder, unless he has assurance to his satisfaction that the amount required to be deposited is in hand for the purpose, or will be produced within two hours.

If the fifteen per cent. be not paid in cash, or in currency notes, within two hours of the sale, or an equivalent amount in Government securities be not lodged, the lot shall be resold on the same day, and, if the remainder of the purchase-money be not paid by noon of the eighth day, notice shall be given of resale on the following day, that is, on the ninth from the first sale, by proclaiming the same by beat of drum through the bazar of the sadr station of the zila, after which the lot shall be resold at the appointed time at the risk of the first purchaser, who shall forfeit the advance of fifteen per cent. already made, and be further answerable for any sum in which the proceeds of the second sale may fall short of the antecedent one; such deficiency to be levied by the process for the execution of decrees of the Civil Courts.

Notes.

SEE SECTIONS 8 AND 9 OF ACT VIII OF 1865, POST.

Repeals and extensions.—So much of s 9 as provides that the deposit, if forfeited, shall be regarded as part of the proceeds of the sale, has been repealed by Act XXV of 1850, s. 1. For the extension of this section to other sales for rent, see Ben. Reg. I of 1820, s. 2. Certain words in s. 9, repealed by Act XVI of 1874, s. 1, have here been omitted. The words "currency notes" have been substituted for the words "notes of the Bank of Bengal" by Act I of 1903.

Defaulter cannot bid.

Who can bid.—A defaulter cannot, under this section, purchase a *patni* sold on account of his default to pay the *patni* rent, either in his own name, or in that of any other person (*Mirza Mahomed* v. *Krishna Mohan*, Spl. W. R., 92). So also where a contract was entered into by a *patnidar* with a stranger stipulating that the latter would purchase the *patni* which had been advertised for sale under Reg. VIII of 1819, and reconvey it to him, receiving the amount of the purchase-money with interest and a further sum in addition by way of remuneration, it was *held* that the contract was invalid under the provisions of s. 23 of the Contract Act as being in contravention of the provisions of s. 9 of the *Patni* Regulation (*Mohun Lall Babu* v. *Udai Narain Bhaduri*, 14 C. W. N., 1031). The term 'defaulter' includes not only a recorded, but also an unrecorded, shareholder, such as a joint *patnidar*. In *Gouri Kanta Bhattacharjee* v. *Raj Kishen Nath* (5 W. R., 106), the plaintiff sued for possession of a certain *patni* by setting aside a *patni* sale, on the allegation, among others, that in fact a defaulter was the purchaser, and that such purchase was illegal. It appeared that the purchase was made by one Ram Lochan Koond, *gomastha* of Kishen Kamal, ostensibly for the latter's brother, Gouree Kamal. It was not denied that the two brothers were members of a joint undivided Hindoo family living in commensality, nor the fact that Kishen Kamal was a defaulter It was *held* that not merely recorded shareholders, but all actual defaulters (such as joint *patnidars*), are prohibited from being purchasers of a *patni*. "The law," observed the Court, "does not provide that the recorded shareholder,

Defaulter includes recorded as well as unrecorded shareholder.

and he only, shall be considered the defaulter, but that those, who have been actual defaulters, that is, directly responsible either as joint or separate *patnidars* for the rents, shall not re-purchase, so that the zamindar may not again be exposed to liability of further default by, or have to deal with, those who have before defaulted. In this view there is no doubt that Gouree Kamal was one of the joint *patnidars*; and that, therefore, he or those who stand in his shoes, would not by law be entitled to purchase at the auction sale." See also *Mohun Lall Batu* v. *Udai Narain Bhaduri* (14 C. W. N., 1031). It should be noticed that the Revenue Sale Law (Act XI of 1859) does not prohibit the purchase by a defaulter.

Purchase by a defaulter only voidable.

Notice, however, that when a *patni*, sold for arrears of rent, is purchased by one of the *co-patnidars* (defaulters), the sale is not absolutely void, but only voidable, and the property remains in the purchaser until the sale is avoided (*Matangini Debya* v. *Prosonno Moyi Debya*, 2 C. L. J., 45*n*.) Nor is the purchase of a *patni* by the defaulter in the *benami* of another in a *patni* sale in contravention of s. 9 of Regulation VIII of 1819 absolutely void (*Harak Chand Babu* v. *Charu Chandra Sinha*, 15 C. W. N., 5; 3 C. C. L., 81). In the case of a *benami* purchase by the defaulter, the sale is good so far as the zamindar is concerned, but, as against the defaulter, the parties are exactly in the same position as they were before the sale (*Jotindro* v. *Debendro*, 2 C. L. R., 419; *Koylash* v. *Kali Prosunna*, 16 W. R., 80; *Kishore* v. *Kalu*, 20 W. R., 33).

Zamindar or undertenant can bid.

The zamindar himself is entitled to bid or any other undertenant, including the *darpatnidar* of the defaulter, if he has not fraudulently withheld payment of his rent (*Bykunt* v. *Monee*, S. D. A., 1850, p. 89; *Sreenath* v. *Ramdhon*, S. D. A., 1859, p. 267; *Sreemutty* v. *Govind*, S. D. A., 14th June, 1862, p. 260; *Fukeer* v. *Hills*, 8 Sel. Rep., 153). A mortgagor of the *patni* is not a defaulter, and is entitled to make the purchase.

Mortgagor can bid.

Repeal.

Forfeiture of the earnest-money and realization of deficiency.—See Act XXV of 1850 (post). So much of s. 9, Reg. VIII of 1819, as provides that the deposit, if forfeited, shall be regarded as part of the proceeds of sale, was repealed by Act XXV of 1850, section 2 of which enacted that such fortfeited deposit shall be applied to defray the expenses of the sale, and the surplus shall be forfeited to Government. This Act was repealed by Act X of 1861, so far as relates to sale in execution of decrees; but as to other sales it still remains in force "—Field's Regulations, p. 512. A purchaser of a *patni* tenure sold for arrears paid the earnest-money, but failed to make good the balance of the purchase-money (Rs. 905) within the time prescribed by the law. The *patni* was, therefore, re-sold for Rs. 225 and the purchaser at the second sale likewise failed to deposit the balance within time. The *patni* was therefore sold for the third time for Rs. 560, and at this sale, though the purchaser deposited the balance, his deposit was made out of time. A question was raised whether the purchaser at the first sale was liable to pay the difference between the bids of the first and the second sale, or the difference between the bids of the first and the third sale. The Commissioner, with the approval of the Board, issued the following instructions to the Collector in dealing with the case:—"The earnest-money deposited by the first and the second purchasers should be forfeited to Government under section 9; and, as the bid by the third purchaser exceeded the bid

Forfeiture.

Board's Proceedings.

by the second, the second purchaser should be refunded the amount of his bid less the deposit. The first purchaser should be held liable for the difference between the first and the third bids. The amount of the third purchaser's bid and so much as may be recovered from the first purchaser is to be dealt with as the purchase-money under this section."—(Board's Miscellaneous Proceedings of 22nd August, 1885, No. 45, Collection 7, File 286 of 1885.)

Forfeiture need not be ordered immediately.

In a certain case, where the purchaser of a *patni taluk*, sold for arrears of rent, failed to make good the full amount of the purchase-money within the time prescribed by the law owing to his missing the train, the Board agreed in holding with the Commissioner that the forfeiture of the earnest-money need not be ordered immediately on default being made at noon on the eighth day, but that it should follow the re-sale of the estate on the 9th day. (Board's Misc. Proc. of 12th July, 1894, No. 71, Collection 2, File 300 of 1894).

But forfeiture is incurred as soon as default is made.

Observe, however, that the liability of forfeiture of the earnest-money as well as of making good the deficiency in the sale-price is incurred by the auction-purchaser as soon as he has defaulted. The purchaser of a *patni taluk*, sold for arrears of rent, had deposited the earnest-money, but did not make good the full amount of the purchase-money. The earnest-money was thus forfeited to Government, and the *patni taluk* was notified for re-sale. On the date of the re-sale, the zamindar's mukhtear amicably accepted the arrear rent from the defaulting *patnidar*, and the *patni* was not put up for sale. After a lapse of nearly 2 years, the auction-purchaser applied for the refund of the earnest-money. The Commissioner informed the Collector that the auction-purchaser's prayer should be rejected on the ground (1) that he had made no attempt to pay in the purchase-money on the day of the order of the re-sale, and (2) that he had failed to take any steps to have the order of forfeiture set aside for a period of nearly two years. The Board, on appeal, *held* that the forfeiture is incurred when the default is made, and the zamindar has no longer a right to come to any agreement with the purchaser or the debtor such as could do away with the forfeiture. (Board's Miscellaneous Proceedings of 18th January, 1896, No. 280, Collection 2, File 300 of 1894).

Deficiency must be recovered by civil suit.—A suit to recover the deficiency, for which the defaulting purchaser is made answerable under s. 9 of Reg. VIII of 1819, is maintainable in the Civil Court: "The words, such deficiency to be levied by the process for the execution of decrees of the Civil Courts," observed the Judges, "seem to indicate that the Civil Courts, and not the Revenue authorities, are to levy the deficiency in question. But, unless there is some decree or order directing the deficiency to be raised, there is nothing to execute: and there is no machinery provided by which such order or decree can be made by the Revenue-authorities. It must then be made by the Civil Courts in a suit instituted for the purpose." (*Raghuram Hazra* v. *Mohesh Chandra Bandopadhya*, 7 C. W. N., 111).

Forms to be observed in selling.

10. At the time of the sale the notice previously stuck up in the cutcherry shall be taken down, and the lots be called up successively in the order in which they may be found in that notice.

A person shall attend on the part of the zamindar with a particular statement of the payments made up to the day of sale, on account of the balance of each advertised lot, together with the receipt for, or certificate of, the notice directed to be published in the mufassal, nor shall any lot be put up to sale until the statement produced shall have been inspected and the existence of a balance for the year ascertained therefrom nor until the receipt for the notice shall have been read; the observance of which forms shall be recorded in a separate *rubakari* to be held upon each lot sold.

If the sale be of the description provided for in the third clause of section 8 of this Regulation, the *kistbandi* of the defaulter shall likewise be produced, in order that it may be seen that the balance remaining unpaid exceeds a four-anna proportion of the demand up to the date of sale; nor shall the sale take place unless this be ascertained.

The zamindar shall be exclusively responsible for the correctness and authenticity of the papers to be thus exhibited, nor shall the public officer making the sale be answerable in any respect, except for its fairness and publicity, and for the observance of the rules prescribed for his guidance in this Regulation.

Notes.

See notes in s. 8 at p. 94 under "*Publication at the Collector's cutcherry.*"

Tenure to be sold free of incumbrances by act of defaulter.

11. *First.*—It is hereby declared, that any *taluk* or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said taluk may have been held.

No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zamindar to hold the tenure of his creation answerable, in the state in which he created it, for the rent which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zamindar.

No under-lease to stand after sale.

Second.—In like manner, on sale of a *taluk* for arrears, all leases originating with the holder of the former tenure, if creative

of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land and to collect the rents of the raiyats; this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent.

Third.—Provided, nevertheless, that nothing herein contained shall be construed to entitle the purchaser of a *taluk* or other saleable tenure intermediate between the zamindar and actual cultivators to eject a khudkasht raiyat or resident and hereditary cultivator, nor to cancel *bonâ fide* engagements made with such tenants by the late incumbent or his representative, except it be proved in regular suit, to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor.

Exception in favour of *bonâ fide* engagements with raiyats.

Notes.

See s. 37, Act XI of 1859; s. 12 of Act VII of 1868; ss. 159-161, 164, 165 of the Bengal Tenancy Act; s. 16 of Act VIII (B. C.) of 1865, and s. 3 of Regulation VIII of 1819 (*ante*).

What is an incumbrance.—Section 11 of the Regulation does not define the term "incumbrance," but provides that, when a *patni taluk* is sold for arrears of rent, it is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees. As instances of incumbrances have been mentioned in that section transfers by way of sale, gift or otherwise, mortgages and other limited assignments, and also leases created by the holder of the tenure. These instances of incumbrances cannot, however, be regarded as absolutely exhaustive. It is necessary, therefore, to examine the meaning of the term "incumbrance." Wharton, in his Law Lexicon, defines the term as "a claim, lien, or liability attached to property," which definition is adopted by Romer, J., in *Jones* v. *Barnett* (1 Ch., 611, 620). Sweet, in his Law Dictionary, observes that to encumber land is to create a charge or liability, for example by mortgage, and adds that incumbrances include not only mortgages and other voluntary charges, but also liens, *lites pendentes*, registered judgments and writs of execution. In the Oxford Dictionary, an incumbrace is broadly defined as a burden on property, and reference is made to Bacon's Maxims and Uses where he speaks of certain acts as collateral incumbrances. In the Encyclopædia of American and English Law, an incumbrance is defined as a burden upon land depreciative of its value, such as a lien, easement, or servitude which, though adverse to the interest of the land-owner, does not conflict with his conveyance of the land in fee.

Meaning of Incumbrance.

Similar definitions are given in the Law Dictionaries by Abbott and Anderson. Bonvier, in his Law Dictionary, defines an incumbrance as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by a deed of conveyance," which is taken from the decision in *Prescott* v. *Trueman* (4 Mass., 627; 3 Am. Dec., 249). In *Memmert* v. *McKeen* (112 Pa., 315; 4 Atlantic, 542) an incumbrance is stated to be a burden or a charge on property, a claim or a lien on an estate, which may diminish it in value, and incumbrances are then divided into two classes, namely, *first*, such as affect the title to the property; and *secondly*, such as affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter. In *Jogeshwar Mozumdar* v. *Abed Mahomed Sikdar* (3 C. W. N., 13) an incumbrance was declared to mean anything that restricts or limits the rights of a *patnidar* and interferes with his enjoyment of the subject of the *patni*. And lastly section 161 of the Bengal Tenancy Act defines the term as "any lien, sub-tenancy, easement or other right or interest created by the tenant in his tenure or holding or in limitation of his own interest therein and not being a protected interest." These definitions are comprehensive enough to include rights other than those mentioned in the section as incumbrances.

Customary right to cut and appropriate trees.

Instances of Incumbrance.—It has accordingly been held that a customary right to cut and appropriate trees is within the meaning of section 11 of Regulation VIII of 1819. (*Pradyote Kumar Tagore* v. *Gopi Krishna Mundal*, 1. L. R., 37 Cal., 322). "It is obvious," observed the Judges, "that if a right granted to another to cut and appropriate trees on land is treated as an incumbrance, a customary right which has precisely the same effect may be comprehended in the term 'incumbrance.' By way of analogy, it may well be maintained that a customary right which owes its origin and growth to the acquiescence of the landlord stands on the same footing as a right expressly granted by him; so that, if a right to cut and appropriate trees expressly conferred on a stranger be treated as an incumbrance, a customary right of that description may very well be included in the same category. We are consequently not prepared, as at present advised, to overrule the contention that a customary right to cut and appropriate trees may be an incumbrance on the property."

Lease.

A lease just as much as a sale, gift or mortgage must come within the meaning of the word "incumbrance." (*Jogeshwar Mozumdar* v. *Abed Mahomed Sikdar*, 3 C. W. N., 13). See also *Thakur Dan Roy* v. *Nabin Kishen Ghose* (15 W. R., 552), *Mahomed Askur* v. *Mahomed Wasak* (22 W. R., 213), and *Gopendra Chandra Mitter* v. *Mokaddam Hossein* (I. L. R., 21 Cal., 702).

Under-tenure.

An under-tenure, *e.g.*, a *darpatni*, is an incumbrance within the meaning of s. 11 of Regulation VIII of 1819 (*Brindaban Chandra Chowdhury* v. *Brindaban Chandra Sirkar Chowdhury*, 21 W. R., 324). An under-tenure under a *patni* does not become a protected interest within the meaning of s. 160 of the Bengal Tenancy Act, even though the zamindar may have knowledge of the creation of the under-tenure and may have received the *patni* rent through him (*Mahomed Kaem* v. *Nafar Chandra Pal Chowdhry*, 1 C. L. J., 100-n). A non-occupancy holding is an incumbrance which an auction-purchaser has a right to annul under

s. 159 of the Bengal Tenancy Act (*Ram Lall Sukul* v. *Bhela Gazi*, I. L. R., 37 Cal., 709). An exchange of land is an incumbrance within the meaning of s. 161 of the Bengal Tenancy Act (*Chandra Sakai* v. *Kali Prosunno Chuckerbutty*, I. L. R., 23 Cal., 354). It has been held that a right, created by adverse possession, against the sold-out proprietor is an incumbrance which a purchaser at a revenue-sale under s. 37, Act XI of 1859, is entitled to set aside (*Karim Khan* v. *Brojonath*, I. L. R., 22 Cal., 244). See also *Thakur Dass Roy* v. *Nobin Keshore Ghose* (15 W. R., 552); *Goluk Moni* v. *Haro Chunder* (8 W. R., 62); *Nobin Chunder* v. *Taylor* (I. L. R., 4 Cal., 103). Such a right has also been held to be an incumbrance within the meaning of Reg. VIII of 1819 (*Khantamoni* v. *Bejoy Chand*, I. L. R., 19 Cal., 787; *Lukhmee* v. *Collector of Rajshahie*, S. D. A., 1851, p. 116; *Ram Sunker* v. *Bejoy Govind*, S. D. A., 1852, p. 824). Such an adverse possession is also an "incumbrance" within the meaning of Art. 121, Sch. II of the Limitation Act, Act XV of 1877 (*Najar Chandra Pal Chowdhury* v. *Rajendra Lall Goswami*, I. L. R., 25 Cal., 157). It should be noticed that, whatever may be the nature of the particular incumbrance, it must be either created by the tenant or acquiesced in by the landlord. So a mortgage created by the operation of s. 171 of the Bengal Tenancy Act in favour of a person, who pays the decretal amount and saves a tenure from sale is not an incumbrance, and, as such, not liable to be avoided by the purchaser of tenure at a sale in execution of a decree for arrears of rent (*Pasupati* v. *Narayan*, 1 C. W. N., 519; I. L. R., 24 Cal., 537). S. 171 of the Bengal Tenancy Act is based on s. 13 of Regulation VIII of 1819, and consequently a mortgage created by the operation of the latter section has the same effect. When a mortgagee of a tenure has enforced his lien and obtained his decree, it is no longer an incumbrance on the tenure (*Abhai Kumar Sen* v. *Bejai Chand*, I. L. R., 29 Cal., 813). An occupancy or non-occupancy holding, if not held by a *khudkast raiyat*, that is, a resident and hereditary cultivator, is an incumbrance (*Jugeshwar* v. *Abed Mahomed*, 3 C. W. N., 13).

Exchange of land.

Adverse possession.

Mortgage.

Occupancy or non-occupancy right.

Annulment of Incumbrances.—In the case of arrears of rent, a landlord of a *patni taluk* has two courses open to him: he may either proceed under Regulation VIII of 1819 or he may sell the *taluk* under Chapter XIV of the Bengal Tenancy Act. The provisions of that chapter apply to *patni* tenures in addition to the summary procedure laid down in the *patni* enactments. In either case, on a sale being finally confirmed, the purchaser is entitled to avoid the incumbrances created either by the actual defaulter or by any of his predecessors and to have possession of the *taluk* in the same state as it stood at its creation by the zamindar. (*Mussumat* v. *Luckeemoni*, S. D. A., 1850, p. 349; *Uma Nath* v. *Raghoonath*, W. R., F. B., 10; 1 Hay, 75 and Marsh., 43; *Brojo Sundari* v. *Fatik Chandra Roy*, 17 W. R., 407). So, where lands appertaining to a certain *taluk*, which was sold under Regulation VIII of 1819 for arrears of rent, were held from the owner under a *kaimi jama* tenure under which the plaintiff, who sued the purchaser for confirmation of his title, cultivated the lands through persons called *bargaits* with whom he shared the profits in the same way, it was *held* that, under sec. 11 of that Regulation, the plaintiff's tenure was cancelled (*Mohim Chunder* v. *Jotirmoy*, 4 C. L. R., 422). In the case of *Gopendra Chandra Mitter and others* v. *Mokaddam Hossein and others* (I. L. R., 21 Cal., 702) a *mokarrari* lease was granted in

Chapter XIV of the Bengal Tenancy Act also applies to patni sales.

In either case purchaser entitled to avoid incumbrance.

1839 to the predecessors of the defendants by the then *patnidar* of a *patni* created in 1819. In 1848 the *patni* was sold for arrears of rent under the provisions of Regulation VIII of 1819, but the purchaser at that sale did not interfere with the *mokurrari*. In 1885 the *patni* was again brought to sale under the same Regulation for arrears of rent, the default being made by the successors of the purchaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside the *mokurrari* lease, contending that they were, by virtue of their purchase, entitled to avoid all incumbrances created by any *patnidar*, and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of s. 11 of the Regulation restricted the plaintiffs to avoiding incumbrances which were the acts of the immediate defaulter, and that, as the purchaser in 1848 and his successors in title previous to the default in 1885 had not interfered with the *mokurrari* lease, the plaintiffs could not have it set aside. *Held* that the plaintiffs were entitled to avoid the *mokurrari*. *Held* also that, having regard to the policy and principle of the Regulation, a zamindar is entitled to bring a *patni* to sale in the same condition in which it was at the time of its creation, and the purchaser is, therefore, entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors. Ghose, J., observed:—"The *mokurrari* lease was an incumbrance upon the *patni*, but, inasmuch as s. 11 distinguishes in clauses 1 and 2 between incumbrances by way of sale, gift, mortgage or otherwise, and leases creative of an immediate interest, it may be regarded as the latter. If treated as an incumbrance, it must be held to have accrued upon the *patni* by reason of the defaulting zamindar not having set it aside, though entitled to do so within the meaning of those words in clause 1. If treated as a lease, the words in clause 2, '*holder of the former tenure*,' are wide enough to include any *patnidar*, whether the last or the previous holder." The same view was taken in the case of *Eshan Chandra Kur* v. *Madhab Chandra Ghose*, which is unreported but quoted by Beverley, J., in the case of *Gopendra Ch. Mitter* v. *Mokaddam Hossein* (I. L. R., 21 Cal., 702), referred to above. There the Judges observed: "The law states that a *patni taluk* sold for arrears of rent is sold free of all incumbrances and leases to middlemen made by the defaulting proprietor. When the *patnidar* who, it is said, granted the defendant his lease defaulted and his *patni* was sold, that lease became then and there null and void. The new *patnidar* might recognise it, might receive rent under its terms, but it was, under the law, cancelled and remained cancelled until such time as the new *patnidar* renewed it or recognised it as good against him. Similarly, as each succeeding *patnidar* defaulted, the leases given by each *patnidar*, whether they were new leases or mere recognition of old leases, all fell to the ground when the last sale took place. An argument may be raised against this view of the law on the mere wording of the provisions of s. 11 of the Regulation, but, when the wording is taken into consideration with the principles so frequently laid down in that law (see sections 3 and 11) and upon which all incumbrances and leases are declared void, we think there can be no doubt that the effect of the law is at once to void all such incumbrances and leases upon a sale taking place, and that this effect is consequently applicable to

the acts, not only of the last defaulting proprietor, but also of all previous defaulting proprietors."

Meaning of defaulting proprietor.

The words "defaulting proprietor" used in cl. 1, sec. 11, must be read as the proprietor of the tenure in default and were not intended to be restricted to the particular proprietor for whose default the tenure was brought to sale; the words were intended to bear the same meaning as were more fully and accurately expressed in s. 52, Act XI of 1859, by which the purchaser of an estate, not permanently settled, sold for arrears of revenue, was declared entitled to avoid and annul all tenures which may have originated with the "defaulter or his predecessors being representatives or assignees of the original engager." Similarly, the word "defaulter" in cl. 2, s. 11, must be given a wider application so as to include his predecessors being representatives or assignees of the original *patnidar* (*Gopendra Chandra Mitter* v. *Mokaddam Hossein*, I. L. R., 21 Cal., 702).

Incumbrance must have come into exsitence since the patni.

The incumbrances, however, must be such as have come into existence since the creation of the *patni taluk* (*Bishumbhur* v. *Durga*, S. D. A., 1858, p. 369). Those existing previously are not voidable nor those which have been created with the permission of the zamindar (*Pearce* v. *Meer*, S. D. A., 1857, p. 1310).

Observe that the Bengal Tenancy Act makes a distinction between an "incumbrance" and a "registered and notified incumbrance," which "means an incumbrance created by a registered instrument, of which a copy has, not less than 3 months before the accrual of the arrear, been served on the landlord." The latter cannot be avoided at a sale under s. 164 of the Bengal Tenancy Act, *i.e.*, at a sale of a tenure or a holding at fixed rates, but it can be avoided at a sale under s. 165 of the same Act, *i.e.* at an adjourned sale of a tenure or holding at fixed rates. No such distinction exists in Regulation VIII of 1819.

Registered and notified incumbrances.

Inferior interest cannot be annulled before superior interest.

The purchaser of a tenure at a rent-sale cannot annul a subordinate interest leaving untouched a superior interest immediately subordinate to the interest purchased by him (*Mofizuddin Sirdar* v. *Ashutosh Chuckerbutty*, 14 C. W. N., 352). "The whole object," observed the Court in this case, "of the reservation of a power in the auction-purchaser to annul incumbrances is to enable him to get rid of a subordinate interest the holder whereof may intercept the rent which would otherwise be legitimately payable to him. If, however, the purchaser is content to leave untouched the tenure-holder immediately subordinate to the interest acquired by him, there is no intelligible principle upon which he should be allowed to annul incumbrances of an inferior grade. Indeed, if he were allowed to do so, the consequences might be very anomalous. To take one illustration, suppose that under a zamindar, *X*, we have a succession of subordinate tenures, *A*, *B*, *C*, and *D*. *X*, in execution of a decree for rent against the holder of *A*, sells up his tenure which is purchased by *Y*. If *Y* annuls *C* but not *B*, what is the position of the latter? He is liable to *Y* for rent, but cannot recover any rent from the holder of *C*, whose interest has been annulled, or from the holder of *D* with whom he has no privity. It is manifest that if *Y* chooses to exercise his power to annul any incumbrance at all, he must begin with *B* and may proceed downwards as far as he chooses, but he cannot select arbitrarily any link in the chain and destroy it, while he allows those above it to remain

unaffected." The same principle would apply in the case of sales under Regulation VIII of 1819.

Sale of a portion does not avoid incumbrances.

It should be noticed that s. 167 of the Bengal Tenancy Act does not apply to a sale, in execution of a rent-decree, of a portion only of a tenure or holding, and the auction-purchaser cannot proceed under that section to annul incumbrances (*Ram Kinkar Biswas* v. *Akhil Chandra Chowdhury*, 11 C. W. N., 350).

Nor when several tenures are put up for sale in execution of one decree.

It should also be noticed that where there are several tenures, held by the same tenant, and the landlord has instituted one suit for the rent of all the tenures, he cannot put the tenures to sale under the procedure laid down in Chapter XIV of the Bengal Tenancy Act in execution of the decree obtained in such a suit, so as to enable the purchaser to avoid incumbrances under s. 167 of that Act. A sale under the provisions of that Chapter can take place only when a separate decree has been obtained for the arrears of each tenure or holding, and the sale is held separately in execution of such a decree. (*Hriday Nath Dass Chowdhury* v. *Krishna Prashad Sircar*, 11 C. W. N., 497).

Purchaser at a revenue-sale may transfer his rights to a patnidar.—The rights, which are conferred upon a purchaser at a sale for arrears of revenue under s. 37 of Act XI of 1859, are rights which are capable of being transferred to another person. A *patnidar* has, therefore, the right to exercise such rights (*Koylash Chunder* v. *Jabur Ali*, 22 W. R., 29). But when a purchaser at a sale for arrears of revenue creates a *patni*, he cannot sue to annul a tenure within that *patni*, as his whole right passes to the *patnidar* who alone can institute such a suit (*Sreemunt* v. *Kookoor Chand*, 15 W. R., 481). The same view was taken in the case of *Narayan Chandra Kansabanik* v. *Kashishwar Roy* (1 C. L. J., 579), where it was *held* that not only can the power, given to an auction-purchaser at a revenue sale, to annul under-tenures under s. 37 of Act XI of 1859 be transmitted to a *patnidar*, but a *patnidar* even of a portion of the zamindari can exercise that power, if the whole of the under-tenure sought to be set aside lies within his *patni*.

Incumbrances not void but voidable.—The sale of a tenure for arrears of rent does not by itself cancel the incumbrances: it only gives the purchaser a power to do so, of which he may elect to avail himself or which he may lose by not exercising. (*Govinda Chandra Bose* v. *Alimoddin*, 11 W. R., 160; *Rani Sornomoyee* v. *Sutteesh Chandra Roy*, 2 W. R., P. C., 13; *Raja Satya Saran Ghosal* v. *Mohesh Chandra Mitter*, 11 W. R., 11). In *Annoda Charan Dass Biswas* v. *Mathura Nath Dass Biswas* (I. L. R., 4 Cal., 800; 4 C. L. R., 6) a different view was entertained. The Court held in that case that under Bengal Act VIII of 1865, s. 11, under-tenures became void *ipso facto* by the sale and were not merely voidable at the option of the purchaser. So also in *Mohim Chunder Mozumdar* v. *Jotirmoy Ghose* (4 C. L. R., 422). These two decisions have, however, been virtually superseded by the Full Bench decision in the case of *Titu Bibi* v. *Mohesh Chandra Bagchi* (I. L. R., 9 Cal., 683; 12 C. L. R., 304), where it was *held* that the effect of a sale for arrears of rent under Reg. VIII of 1819 is substantially the same as that of a sale for arrears of revenue under s. 37 of the Revenue Law (Act XI of 1859). In either case the under-tenures are not *ipso facto*

avoided by the sale but are voidable only at the option of the purchaser. The same view has been taken in the case of *Madhu Sudhan Koondoo* v. *Ram Dhan Ganguli* (12 W. R., 383 ; 3 B. L. R., 431). In that case it was decided that no sales for arrears of rent, not even sales under Regulation VIII of 1819, have *ipso facto* the effect of cancelling tenures created by defaulting owners ; they merely give to a purchaser the power to cancel such tenures if he thinks proper : Markby, J., remarked :—" I think the judge is wrong in saying that, by the sale for arrears of rent, all the previous tenures created by the defaulting *patnidar* were cancelled. That appears to me contrary to the ruling of the Privy Council, *Ranee Sornomoyee* v. *Sutteesh Ch. Roy* (2 W. R., P. C., 13), to that of the same Court in 11 W. R., P. C., 11 ; and also to the decision of Justices Bayley and Dwarkanath in 11 W. R., 160. It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII of 1819, sec. 11, cl. I, but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in these decisions on the Regulations of 1793 and 1822 and Act VI of 1862 (B. C.), which are all in *pari materia* ; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect to cancel tenures created by defaulting owners, but merely to give to the purchaser the power to do so if he thinks proper." Although, however, the incumbrances are voidable, the purchaser may be precluded from exercising that right if he has accepted rent (*Shristeedhur* v. *Pran Nath*, S. D. A., 1858 ; page 170 ; *Sreemunt* v. *Kookoor*, 15 W. R., 481).

Khudkast raiyats protected.

Protected interests.—See s. 160 of the Bengal Tenancy Act. There are certain rights in land which are protected notwithstanding a sale under the Regulation. *Khudkast* raiyats, or resident and hereditary cultivators, cannot be evicted. The permanent tenants, settled in the village, were called *Khudkast* raiyats, *i.e.*, raiyats cultivating land of their own village or the village in which they resided, as opposed to *Paikasht* raiyats, or raiyats who were residents of another or neighbouring village and cultivated land near their own village. The former had practically hereditary rights of occupancy, but the best authorities are agreed that they could not transfer their rights, *i.e.*, sell their lands—this privilege belonging to the zamindar alone. Their interest, or the right of occupancy into which modern legislation has turned it, has, however, of late years become not uncommonly saleable in the Lower Provinces. The latter have been held by all authorities to have no rights and to be mere tenants-at-will.

This distinction between the *Khudkast* and the *Paikast* raiyats is nowhere mentioned in the Rent Act of 1859, though it is alluded to as still existing in some of the later enactments, *e.g.*, Act VIII of 1865. The broad distinction now existing between the rights of the actual cultivators is the creation of Act X of 1859, which divides them into raiyats having rights of occupancy and those having no such rights and who are merely temporary tenants or tenants-at-will. Under the present law any raiyat who cultivates or holds land for a period of 12 years, whether under a written lease or not, acquires a right of occupancy in the land so cultivated, or held by him, so long as he pays the rent payable on account of the same. The question, therefore, arises : Is an occupancy or a non-occupancy holding protected under clause 3,

s. 11? The point came up in the case of *Jogeshwar Mozumdar* v. *Abed Mahomed Sikdar* (3 C. W. N., 13), where it was *held* that an occupancy or a non-occupancy holding if not held by a *khudkast* raiyat, *i.e.*, a resident and hereditary cultivator, is an incumbrance and not protected from ejectment by the terms of cl. 3, s. 11 of Reg. VIII of 1819, and may be annulled by a purchaser at a sale under the said Regulation. The law, therefore, seems to be that, if an occupancy or a non-occupancy holding is held by a *khudkast* raiyat, it is protected, but not if it is held by a *paikast* raiyat, *i.e.*, a raiyat not resident in the village.

Bonâ fide engagements protected.

Nor can *bonâ fide* engagements with such raiyats be interfered with by a purchaser except under the special circumstances mentioned in clause 3 of this section. The purchaser of a *patni taluk* at a sale held under the Regulation sued a tenant within the *taluk* for a *kabuliyat* at an enhanced rate of rent. The former *patnidar* had brought a similar suit, in which it was decided that the rent was not liable to enhancement. *Held* that the purchaser was bound by this decision, and that he did not occupy a position analogous to that of the purchaser of an estate sold for arrears of Government revenue, who is not the privy in estate of the former proprietor (*Tara Pershad* v. *Ram Nursing*, 6 B. L. R., App., 5; 14 W. R., 285). So also where the plaintiff, an auction-purchaser, sued the defendant, the holder of a tenure in perpetuity, not merely for an enhancement of rent, but also, without notice, for a *kabuliyat* at an enhanced rate, contending that, as an auction-purchaser, he was entitled either to treat the defendant as a trespasser or enhance the rent to a fair value at his own option, it was *held* that if the plaintiff upholds the defendant's tenure, he must uphold it for the whole term for which it was originally granted. An auction-purchaser cannot, as contended, compel the holder of a tenure in perpetuity to execute a *kabuliyat* acknowledging himself to be a tenant for one year at an enhanced rent. (*Haran Chandra Ghose* v. *Guru Charan Sircar*, 10 W. R., 421). The grantor of a *patni* tenure, who subsequently purchases the lands granted by him in *patni* at the sale of the *patni* tenure, does not *ipso facto* revert to the position he held as proprietor, and is not entitled to recover rent from the tenants at the rate he was receiving when he granted the *patni* without reference to the amount realized by the *talukdar* in the interim. There is no provision in the *patni* law which gives the purchaser at a *patni* sale the power to collect rent at a higher rate than was demandable by his predecessor without establishing his right so to do, the 3rd clause of s. 11 expressly providing that engagements entered into by a *patnidar* with a raiyat having certain defined rights shall not be cancelled by a purchaser at a *patni* sale except by a regular suit. (*Majoramoyka* v. *Rajah Nilmoni Sing*, 13 B. L. R., 198; 21 W. R., 326). Again, a purchaser of a *patni taluk* at a sale held under Regulation VIII, 1819, is not entitled to hold the property free from a customary right, or a right recognised by usage, which has grown up during the subsistence of the *patni*, and under which occupancy-raiyats are entitled to appropriate, and convert to their own use, such trees as they have the right to cut down, inasmuch as he is not entitled to cancel a *bonâ fide* engagement made by the defaulting proprietor with the resident and hereditary cultivators. (*Pradyote Kumar Tagore* v. *Gopi Krishna Mundal*, I. L. R.,

37 Cal., 322). "The third clause of section 11 of the *Patni* Regulation," said the Judges in this case, "provides that the purchaser shall not be entitled to cancel a *bond fide* engagement made by the defaulting proprietor with resident and hereditary cultivators. If the landlord made an engagement with such a tenant that he would be entitled to appropriate the trees in his holding, the purchaser of the *patni talúk* would, in our opinion, be bound thereby. A customary right in favour of all the tenants, by which they are entitled to appropriate the trees, would be equally operative against the auction-purchaser. It is further obvious that, as pointed out by this Court in *Majoramojha* v. *Raja Nilmoney Sing Deo* (13 B. L. R., 198 ; 21 W. R., 326), the fact that the auction-purchaser is the original zamindar who created the *patni* does not place him in a better position. We must, therefore, hold that treating an engagement with a stranger by which he is authorized to cut and appropriate trees as an incumbrance imposed upon the land by the owner, treating further a customary right of this description, which owes its origin and growth to the acquiescence of the owner, as included in the category of incumbrances, the creation and growth of such right, whether contractual or customary, must, in the present instance, be regarded as a *bond fide* engagement with a resident and hereditary cultivator, which the auction-purchaser at the *patni* sale is not entitled to abrogate." Where a *patnidar* commits default, and purchases the tenure when it is sold in execution of a decree against himself, he cannot claim the benefit of the law relating to auction-purchasers under s. 105, Act X of 1859 and s. 11, Regulation VIII of 1819, and ask the Court to set aside the title of a third party (*e. g.*, that of a *darpatnidar*) which had been created by himself. Where he himself has sold to a third party, he is bound to recognise that party's purchase and also all *bond fide* leases under that party. (*Meheroonissa Bibi* v. *Hara Charan Bose*, 10 W. R., 228.)

Transfer made with permission protected.

A transfer or assignment made under the express authority of the zamindar is also protected both under Regulation VIII of 1819 and under s. 160 (*g*) of the Bengal Tenancy Act. Sections 3 and 4 of Regulation VIII of 1819 cannot be so read as to hold that, by them, the landlord expressly gives the *darpatnidar* permission to create a mortgage within the provisions of s. 160 (*g*) of the Bengal Tenancy Act. A mortgage created by a *darpatnidar* of his interest in the *talúk* does not, therefore, amount to a protected interest within the meaning of that section. (*Akhoy Kumar* v. *Maharajah Bejoy Chand*, I. L. R., 29 Cal., 813 ; 6 C. W. N., *cxlix*.) Where raiyats having permanent interest in a holding sold a portion of it, and the transferers again sold a portion of their purchased interest to one *R*, and *R* obtained settlement from the landlord, it was *held* that the interest of the transferee was not an incumbrance, which could be avoided by the purchaser at a rent-sale (*Bhairab Chandra Chowdhury* v. *Okhil Chandra Chowdhury*, 11 C. W. N., 217). A *patni kabuliyat* contained the clause, "If I should let out this *mahal in darpatni* to any person, such *darpatnidar* shall act according to the terms of my *kabuliyat*," and it was *held* that the clause simply means that, if the *patnidar* creates a subordinate tenure, the subordinate tenure-holder must perform the duties imposed upon the *patnidar* himself by the lease, and does not amount to an express or implied permission to the *patnidar* to create a *darpatni* within the meaning of s. 160 (*g*) of the Bengal Tenancy Act.

It was also *held* that knowledge on the part of the proprietor of the creation of the *darpatni* and acceptance by him of the *patni* rent from the *darpatnidar* are not sufficient to constitute the *darpatni* a protected interest within the meaning of that section. (*Mahomed Kazem* v. *Nuffar Chandra Pal Chowdhury*, I. L. R., 32 Cal., 911 ; 9 C. W. N., 803.)

Onus.

Onus as regards incumbrances.—The purchaser is a representative of the zamindar and is subject to the same rules as to the onus of proof as the zamindar himself. It lies, therefore, upon him in the first instance to prove when the incumbrance was created, but, as soon as he has made out a *primâ facie* case, the burden is shifted and the holder of the incumbrance has to show that he is protected.

Limitation.—See s. 121 of the Limitation Act (XV of 1877) and sections 167, 184, and 185 of the Bengal Tenancy Act.—Under the general law it is not necessary, in order to avoid an incumbrance, for the purchaser to give any notice or do any act before bringing his suit, provided the suit is brought within the time prescribed by Art. 121 of the Limitation Act (XV of 1877) (*Titu Bibi* v. *Mohesh Chunder*, 12 C. L. R., 304 ; I. L. R., 9 Cal., 683 F. B.). Justice requires, however, that the option of avoiding an incumbrance should be exercised "within a reasonable time" (*Raja Satyasaran* v. *Mohesh Chunder* 11 W. R., P. C., 10). In *Wooma Nath Roy Chowdhury* v. *Raghu Nath Mitter* (5 W. R., 63), where there was a great delay on the part of the auction-purchaser in exercising the right of ejectment, the High Court observed :—"Considering that the defendant purchased it (*i.e.*, the tenure) in 1246, that for 15 years he, without any objection, received rents from the plaintiff at the old rates, and has subsequently only endeavoured to enhance the rate of rent to be paid by him, we think, that on the principle laid down by the Privy Council in the case of *Ranee Sornomoyee* v. *Maharajah Sutteesh Chundra Roy Bahadur*, he must be considered to have waived any right which he may have had under cl. 2, s. 11 of Regulation VIII of 1819, to eject the plaintiff at the time of the purchase by him of the *patni taluk*. It is true that the case before the Privy Council refers to a sale for arrears of revenue under Regulation XLIV of 1793, and the present to a sale for arrears of rent due by a *patnidar* under Regulation VIII of 1819, but the principle involved in both cases is the same. In both laws, leases created by the outgoing zamindar or *patnidar* stand cancelled are one to be considered cancelled from the date of the sale, that is, those leases are voidable in both cases equally ; but besides these, the words of the two laws, to use the language of the Privy Council, seem to point to something to be done on change of ownership, not to something to be done after an indefinite lapse of time ; and consequently, if the purchaser does not exercise the power of eviction which he undoubtedly has under cl. 2, s. 11 of Regulation VIII of 1819 within a reasonable time, but allows the tenant to continue in possession, we must, with the Privy Council in the analogous case, consider that he has acquiesced in that possession and waived his right to evict the tenant." Observe that s. 167 of the Bengal Tenancy Act lays down one year as the limit for avoiding the incumbrances.

Right to avoid incumbrances must be exercised within a reasonable time.

It is now well settled that a person, who has held possession of property adversely against a *patnidar*, cannot successfully set up such adverse pos-

session against a person who has purchased the property at a sale under Regulation VIII of 1819, as against such a purchaser the adverse possession commences from the date when the sale becomes final and conclusive. In *Woomesh Chandra Gupta* v. *Rajnarain Roy* (8 W. R., 444 ; 10 W. R., 15), the principle, which underlies this position, was elaborately examined by Sir Barnes Peacock, C. J., and it was pointed out that the cause of action of a purchaser of a tenure, sold free from incumbrances, accrues when he purchases it because it is sold in the state in which it was created, and the purchaser is entitled to have it in the state in which it was created, notwithstanding any under-tenure which may have been created by the defaulter and notwithstanding any encroachments by trespassers upon the holders of such under-tenures; the purchaser has consequently a right to turn out under-tenants and is also entitled to turn out persons who have encroached upon the defaulter. In *Woomesh Chandra Gupta* v. *Rajnarain Roy* (8 W. R., 444 : 10 W. R., 15) referred to above, a *patni taluk* was sold by auction for arrears of rent and was purchased by the zamindar who had created it. More than 12 years before this purchase, a neighbouring *talukdar* had encroached on the *patni*, and the question was whether his 12 years' possession was a good bar against the zamindar suing to recover the land encroached upon. Phear, J., held that it was not, and observed :- "that On the completion of the auction-sale the *patni* merged in the superior title of the zamindar vendee, who thus became entitled, not as claiming through the *patnidar* but by virtue of his original rights as zamindar, to possession of the entire estate. In this state of things, the withholding possession from him attributed to the defendant constitutes a new cause of action, and is not simply a continuance of that which had before accrued to some other person (*viz.*, the *patnidar*). The defendant's trespass is a violation of the plaintiff's right of possession which he is entitled to maintain by action independently of the fact that the trespass in question is only a persistence in that which was before a violation of the *patnidar's* right of possession. The violation of right in the two instances is not one and the same thing, because the two rights of possession are themselves distinct. The zamindar does not acquire the right of possession from the *patnidar*, but he does so as a consequence of the *patnidar's* tenure and rights all falling to the ground." Bayley, J., however, held otherwise. His opinion was that the adverse possession by the third party was of the lands, the proprietary right of which remained with the zamindar, and was not affected by the intermediate *patni* right to collect rents, etc., and that on that proprietary right being interfered with, the cause of action arose. Whenever the adverse possession commenced, the zamindar, he added, could have sued whether there was a *patni* or not, and that as he did not, limitation barred the suit. The case came up before the Court of Appeal (10 W. R., 15), and that Court agreed with the view expressed by Phear, J., and *held* that the cause of action to the zamindar, who was the purchaser of an estate free from incumbrances against the defendant, who was a trespasser and had encroached on the *patnidar* (defaulter), must be taken to accrue at the same time as the zamindar's right to turn out the under-tenants of the defaulter, *viz.*, from the time of the purchase of the tenure of the defaulter ; and the fact that

Limitation in case of adverse possession.

Principle.

Adverse possession against auction purchaser.

the zamindar was both *talukdar* and purchaser did not prevent him from exercising the same rights as any other purchaser would have been entitled to do. So also in *Khantamoni Dassi* v. *Bejoy Chand Mahtab* (I. L. R., 19 Cal., 787), where the plaintiff sued to recover possession of some *lakheraj* land situated within the *patni* property bought by the defendant at a *patni* sale, and where she claimed title by reason of her having, together with her predecessor, been in possession of the land for upwards of 12 years adversely to the landlord, it was decided that no adverse title could be pleaded against the defendant, who had purchased the property at a *patni* sale held within 12 years from the date of the institution of the suit, and who was entitled to it free of all incumbrances created subsequent to the original grant of the *patni*. Again, in *Nafar Chandra Pal Chowdhury* v. *Rajendro Lall Gosswami* (1. L. R., 25 Cal., 167), where a suit was brought by the auction-purchaser to recover possession of land situated within the *taluk* against a trespasser, who alleged that he had held the land adversely, it was *held* that the period of limitation would in such cases begin to run from the date when the sale became final and conclusive. In a case where, by virtue of a purchase under Regulation VIII of 1819, the zamindar, a minor Hindu widow, became entitled to sue in ejectment a trespasser who had unlawfully dispossessed the *patnidar*, and where such a widow, during the continuance of her minority and before her right of action became barred by limitation, took a son in adoption, it was *ruled* that the adopted son became clothed with all the rights which the adoptive mother had at the time of adoption, and could sue in ejectment at any time during his minority or within three years from the cessation of infancy, although twelve years might have elapsed from the date of the purchase at the *patni* sale (*Harak Chand* v. *Bejoy Chand Mahtab*, 2 C. L. J., 87 ; 9 C. W. N., 795).

Adverse possession when patni is surrendered.

In other cases, limitation runs from the period when the possession becomes adverse. In *Govinda Nath Shah Chowdhury* v. *Surja Kantha Lahiri and others* (I. L. R., 26 Cal., 460), the land in dispute along with other lands was let out in *patni* and *darpatni* by the predecessor in interest of plaintiffs and, during the continuance of the leases, it was taken possession of and held adversely by the defendants or their predecessor. The *patni* and *darpatni* were relinquished by the *patnidar* and the *darpatnidar* in favour of the plaintiffs on the 29th June, 1891, and they, on the 28th June, 1893, brought a suit for recovery of possession of the disputed land from the defendants. The defence was that the suit was barred by limitation. *Held* that Article 144, Sch. II of the Limitation Act, applied to the case, and that the suit was barred by limitation, in as much as it was not brought within 12 years from the date when the possession of the defendants became adverse to the plaintiffs: the plaintiffs became entitled to *khas* possession by the relinquishment of the *patnidar* and the *darpatnidar*, and so must be held to be affected by the adverse possession that was taken against the *patnidar* and *darpatnidar*, whose rights they had acquired through their voluntary relinquishment. As the *patni* and the *darpatni* came to an end, not by reason of any sale for arrears of rent, but by voluntary relinquishment by the *patnidar* and *darpatnidar* in favour of the zamindar, the case did not come under Art. 121 of the second Schedule of the Limitation Act.

Schedule III of the Bengal Tenancy Act prescribes one period of limitation for all suits for arrears of rent brought under the provisions of the Act, whether the rent is payable under a lease or not, and whether the lease is registered or not (*Mackenzie* v. *Haji Syad Mohamed Ali Khan*, I. L. R., 17 Cal., 469). It is equally applicable to suits for arrears of rent of *patni taluks* (*Barnamayi Dasi* v. *Burnamayi Chaudhurani*, I. L. R., 23 Cal., 191). In the last mentioned case a landlord, to recover arrears of rent for the year 1279 *B. S.* from the *patnidar*, filed a petition on the 1st of *Byaik*, 1298 (13th April, 1891) in the Court of the Collector under the provision of Regulation VIII of 1819, praying for the sale of the *patni taluk*. The *taluk* was sold and was purchased by the landlord on the 1st *Jeyt*, 1298 (14th May, 1891). The whole of the arrears not being realised by the sale-proceeds, the landlord brought an action, on the 14th May, 1894, for the balance of the *patni* rent to the end of 1297 *B. S.* (12th April, 1891). The defence was that the suit was barred by limitation. *Held* that the suit was governed by the provisions of the Bengal Tenancy Act, s. 184, and Schedule III, Art. 2(6), and that, as the period of limitation in a suit for rent provided by that Article was three years from the last day of the Bengali year in which the arrear falls due, and as, in this case, the arrear fell due in the Bengali year 1297, which ended on the 12th April, 1891, and the suit was not commenced until 14th May, 1894, *i.e.*, more than three years from the last day of the Bengali year in which the arrear fell due, it was barred by limitation. **Limitation in case of arrears of rent.**

12. The rules of the preceding section, being declaratory of the principle to be observed on all occasions wherein saleable tenures are made responsible for the zamindar's reserved rent, will equally apply to the case of *taluks* heretofore sold, as to those that may be sold henceforward, if the sale shall have been fair, and the process observed in conducting it shall have been that recognized and in use in the district at the time of selling. **Above rule to take effect retrospectively.**

Nothing, however, herein contained shall operate to the prejudice of any agreement, express or implied, now subsisting between the purchaser of a *taluk* and the lessees of his predecessor. **Proviso.**

Neither shall the rule for the fall of under-tenures be considered to apply to any private transfer by a *taluqdar* of his own interest, nor to a public sale in execution of a decree, nor to the case of a relinquishment by the *taluqdar* in favour of the zamindar, nor to any act originating with the former holder, other than default as aforesaid: all such operations involve only a transfer of the tenure in the state in which it may be held at the time, and the new incumbent succeeds to no more than the reserved rights of the former tenant, such as they may be, and is of course subject to any restriction put upon the tenure by his act. **Rule not to apply to private transfers.**

Reason for allowing under-tenants means of staying sale.

13. *First.*—With reference to the injury that may be brought upon the holder of a *taluk* of the second degree by the operation of the preceding rules, in case the proprietor of the superior tenure purposely withholds the rent due from himself to the zamindar, after having realised his own dues from the inferior tenantry, it is deemed necessary to allow such *talukdars* the means of saving their tenures from the ruin that must attend such a sale, and the following rules have accordingly been enacted for this purpose.

How under-tenants may stay sale.

Second.—Whenever the tenure of a *talukar* of the first degree may be advertised for sale in the manner required by the second and third clauses of section 8 of this Regulation for arrears of rent due to the zamindar, the *talukdars* of the second degree, or any number of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the zamindar on the day appointed for sale; in like manner they shall be entitled to lodge money antecedently, for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the sale shall not proceed, but after making good to the zamindar the amount of his demand any excess shall be paid back to the person or persons who may have lodged it.

Procedure in case of amount lodged being rent due from under-tenant;

Third.—If the amount so lodged shall be rent due by the inferior *talukdar* to the holder of the advertised tenure, the same shall be stated at the time of making the deposit, and the amounts shall be carried to the account of the tenant or tenants lodging it, and be deducted from any claim of rent that may at the time be pending, or be thereafter brought forward against him or them by the proprietor of the advertised tenure, on account of the year or months for which the notice of sale may have been published.

and in case of amount lodged being advanced from private funds.

Fourth.—If the person or persons making such a deposit, in order to stay the sale of the superior tenure, shall have already paid the whole of the rent due from himself or themselves, so that the amount lodged is an advance from private funds and not a disbursement on account of the said rent, such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the *taluk* so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner

as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced, from any profits belonging thereto.

If the defaulter shall desire to recover his tenure from the hands of the person or persons who, by making the advance, may have acquired such an interest therein, and entered on possession in consequence, he shall not be entitled to do so, except upon repayment of the entire sum advanced with interest at the rate of twelve per cent. per annum up to the date of possession having been given as above, or upon exhibiting proof, in a regular suit to be instituted for the purpose, that the full amount so advanced with interest has been realised from the usufruct of the tenure.

Notes.

See sections 171 and 172 of the Bengal Tenancy Act which are based on the provisions of this section and section 6, Act VIII of 1865.

Payment by under-tenants.—A *darpatnidar* or any other tenure-holder, whether his name is registered in the zamindar's *sharista* or not, may protect the *patni* from sale by paying the amount of arrears, but a tender to stay a sale under Regulation VIII of 1819 must be of the whole of the zamindar's rent, and without any condition as to its being kept in deposit by the Collector (*Ram Charan* v. *Dropomoyi*, 17 W. R., 122). Where it appeared that a sum of money, sufficient to liquidate the arrear, was lying in the Collector's treasury at Birbhum where the plaintiff expected the sale would be held, subject to the orders of the principal Sudder Ameen of that District, and an order had been obtained from his Court for the sum in question to be paid to the zamindar, but the sum had not reached the Collector of Burdwan previous to the sale, it was *held* that that there was no such tender made as, under the Regulation, would entitle the defaulter to have the sale stayed (*Kali Kishen Mukherjee & others* v. *The Maharajah of Burdwan & others*, 5 W. R., 39).

A darpatni dar or any other tenure holder may pay.

But must pay the whole of the zamindar's rent unconditionally.

A *patni taluk* under the Burdwan Raj was advertised for sale for arrears of rent by order of a Collector who was in temporary charge of the Burdwan Raj estates under section 38, Act IX (B. C.) of 1879. The *darpatnidars* deposited the amount due in order to save the *taluk* from sale, and the Collector ordered that they should be put in possession under clause 4 of this section. An appeal was preferred to the Commissioner against the sale by the *patnidars*, who contended that, under such section 78 of Act VII (B. C.) of 1876, they were not bound to pay the *patni* rent to the Collector in as much as his name was not registered as proprietor or manager, and that consequently he could not sell the *patni* for default. The *darpatnidars* had, therefore, no valid reason for depositing the arrear, and had no right to be put in possession on account of their having deposited it. Their appeal was rejected and the Board agreed with the Commissioner. They observed that section 78 of the Land Registration Act refers to property in respect of which the proprietor or

Collector need not register his name as manager, court of wards, before selling patni.

manager is required by the Act to cause his name to be registered. The Act declares that application for registration must be made within six months from the date of the succession or the assumption of charge as manager, and it is clear that the provisions of section 78 were not meant to apply to any person, till that person had failed to comply with the provisions of section 42. In this case, the *patni taluk* was not a property in respect of which the Collector was required by the Act to cause his name to be registered, because he had not been in charge of it for six months—(Board's Miscellaneous Proceedings of 22nd August, 1885, No. 200, Collection 7, File 290 of 1885. See Sale Law Manual, p. 83).

Board's Proceedings.

Payment to be made to whom.—See notes under the same heading in s. 14 (*post*).

Defaulting patnidar must pay before date of sale if he does not contest arrears.

When should the payment be made.—A defaulting *patnidar*, who has not contested the arrear summarily under the provisions of section 14, Regulation VIII of 1819, must, in the event of a petition being presented at the end of the year, pay the amount claimed before the day of sale; and in like manner, in the event of a petition being presented in the middle of the year, he must pay the advertised balance, or the requisite proportion as laid down in cl. 3, s. 8, before the day of sale. Upon the date of sale, if there is any balance outstanding and the zamindar insists upon a sale, the Collector must sell. A *patnidar*, who has contested the award summarily as above, is entitled to lodge the amount of arrear demanded after the lot has been put up. *Talukdars of the second degree*, on the contrary, who wish to stay the sale under clause 2, s. 13, by paying the amount of balance that may be declared due by the person attending on the part of the zamindar, must do so before the lot has been called up. They may of course lodge money antecedently, as allowed by the same clause (Rule 4, Part II, section VIII, p. 114 of the Board's Manual).

Board's Rule.

If he contests he can pay when lot called up.

Darpatnidar must pay before the lot is put up.

(i) He is entitled to set off.

Remedies open to an under-tenant making payment.—If the under-tenant is himself in arrears, the amount deposited by him would go towards the satisfaction of his rent. In a suit by the purchaser of a *patni* against a *darpatnidar* for arrears of rent of the year 1285 (1878), it appeared that, before the plaintiff's purchase, the *darpatnidar* had paid the amount of arrears of *patni* rent for the year 1284 (1877), in order to save the *patni* from being sold under Regulation VIII of 1819, and the amount so paid considerably exceeded the *darpatni* rent due at the date of the suit. *Held* that the defendant was entitled to deduct from the rent claimed the amount paid, under the Regulation, in excess of the *darpatni* rent due up to end of 1284 (*Nobogopal Sircar* v. *Srinath Bandopadhya*, I. L. R., 8 Cal., 877; 11 C. L. R., 37). The zamindar of an estate, in which the plaintiff and the defendant respectively had purchased *patni* and *darpatni* tenures, obtained decrees for arrears of rent accruing before their purchase, though one of the decrees was obtained subsequently to the defendant's purchase, and, in execution of these decrees, he advertized the *patni* for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the *patnidar* against the *darpatnidar* for arrears of rent accruing due subsequently to the defendant's purchase, it was *held* that the defendant was, on the construction of s. 13 of Regulation VIII of 1819 as extended by s. 62 of Bengal Act VIII of 1869 to under-tenures under this Act, entitled to set off such payments against

the plaintiff's claim (*Lalit Mohan Shaha* v. *Srinibas Sen*, I. L. R., 13 Cal., 331). In a suit by a zamindar against the wife of the Nawab Nazim of Bengal for the rent of a *patni* for the years 1284 and 1285, it appeared that the defendant had paid the revenue for 1284 to Government, and it was contended that moneys paid for revenue were payments made to the plaintiff so as to entitle him under sections 59 and 61 of the Contract Act to appropriate them in the discharge of the rent of 1283, which was barred by limitation. *Held* that these payments were properly the subject of set-off as money paid to the use of the plaintiff, and that they could not be appropriated under the Contract Act to the rent of 1283 (*Rukhini Ballav Rai* v. *Jamania Begum*, I. L. R., 9 Cal., 914; 12 C. L. R., 534). But where a payment was made by the vendor of the *darpatnidar* (who had not obtained registration) to save the *patni* from sale, it was held the payment was voluntary and that the registered *darpatnidar* could not seek to deduct the amount from the rent due by him (*Lukhee Narain* v. *Sita Nath*. 6 W. R., Act X, 8).

(ii) or he acquires a lien similar to a mortgage.

If the under-tenant is not in arrears and has already paid his full rent, the amount lodged is considered to be an advance from private funds for which a statutory lien arises in favour of the person making the advance; and he is entitled, on applying for it, to obtain immediate possession of the tenure in order to recover the amount so advanced from the profits. Section 171, cl. (c) of the Bengal Tenancy Act, lays down a similar provision. It provides that "he shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with interest thereon, has been discharged." The difference between this section and cl. 4, s 13 of Regulation VIII of 1819 was pointed out by the Judges in the case of *Ram Narain Routh* v. *Lall Dass Routh* (6 C. L. J., 595). "Clause 4 of s. 13 of the Patni Regulation," they observed, "provides that if an undertenant of the second decree makes a deposit to stay the sale of the superior tenure, and, if he is not himself in arrears, the deposit shall be considered as a loan to the proprietor of the tenure preserved from sale, and the tenure so preserved shall be security for the advance, and the depositor shall be entitled, *on applying for the same*, to obtain *immediate possession* of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto. Apart from the fundamental distinction that, under s. 13 of the Patni Regulation, a deposit can be made only by an under-tenant, whereas under the Acts of 1865, 1869 and 1885, a deposit can be made by any person interested in the tenure of holding, it is worthy of notice that cl. 4 of s. 13 of Regulation VIII of 1819 expressly provides that the depositor shall be entitled upon application to obtain immediate possession of the tenure of the defaulter. In Act VIII of 1885, however, where the language was recast, the provision is that the depositor shall be entitled to possession of the tenure or holding as a mortgagee of the tenant. It is impossible to say that this alteration in language was not intentional. In our opinion, the effect of this change is to make it no longer obligatory upon the execution Court to place the depositor in possession of the tenure or holding saved from sale." A person, who has made a payment under s. 171 of the Bengal Tenancy Act, is, therefore, entitled to be placed in possession of the tenure upon application to the execution Court, and is not bound to bring a regular suit to obtain possession, but an incumbrancer whose interest is not

S. 171 cl. (c) of the Bengal Tenancy Act gives a similar lien.

Difference between the two sections.

Depositor will be put in possession upon application.

voidable because the decree under execution is in favour of a co-sharer landlord and operates as a mere money-decree, is not entitled to make the deposit and obtain possession under s. 171 of the Bengal Tenancy Act (*Umatul Fatima* v. *Nemai Charan Banerjee*, 6 C. L. J., 592). In *Ram Narain Routh* v. *Lall Dass Routh* (6 C. L. J., 595), however, the Judges observed that the view indicated in this case was too broadly expressed. A more correct view, they said, was that, as soon as a person has made a deposit under s. 171 of the Bengal Tenancy Act, if he makes an application to the execution Court, he is entitled to delivery of possession as against the judgment-debtor who is a party to the proceeding, but if, when the writ for delivery is attempted to be executed, the depositor is met by some other person who is in possession, such third party cannot be summarily ousted. Against such a person his remedy is by a regular suit for delivery of possession. So also in *Radhika Nath Sircar* v. *Rakhalraj Gain* (10 C. L. J., 473), it was *held* that an unrecorded purchaser of a share of a *darpatni* may, when the tenure is advertised for sale in execution of a decree for rent by the *patnidar*, apply under s. 171 of the Bengal Tenancy Act. Upon such application he is entitled to be placed in possession without recourse to a separate suit.

Lien a statutory one.

The lien created by cl. 4, s. 13, is the creation of the Statute, and statutory liens cannot be created by consent. The provision of the law must be strictly complied with before any reliance can be placed on the lien. A mere treatment of a undertenure holder by the landlord as a usufructuary incumbrancer is not sufficient to create a statutory lien (*Jukhomall Mehera* v. *Saroda Prosad Dey*, 7 C. L. J., 604). A mortgage created by the operation of s. 171 of the Bengal Tenancy Act is not an incumbrance within s. 161 of that Act and cannot be annulled by a purchaser at sale held under the provisions of Ch. XIV of the Tenancy Act (*Pasupati Mahapatra* v. *Naryani Dasi*, I. L. R., 24 Cal., 537; 1 C. W. N., 519). The mortgage must be of the entire tenure. When a *sepatnidar* pays the amount due from the *darpatnidars*, he has a mortgage over the whole tenure which cannot be divided in proportion to the interests of the *darpatnidars* (unreported case, S. A., No. 47 of 1889, decided by Petheram and Banerjee, JJ., May 1st, 1890).

The mortgage must be of the entire estate.

A *darpatnidar* who has paid a deposit in order to stay the sale of the superior tenure under s. 13, Regulation VIII of 1819, and has, under cl. 4, come into possession of the tenure and is entitled to the profits of it, is bound to give notice of his title to the raiyats. In the absence of such notice he cannot recover from them rents already paid by them to the *patnidar* (*Nilmoney Roy* v. *James Hills*, 4 W. R., Act X, 38).

Notice must be given to tenants.

Notice that the depositor may also bring a regular suit to recover the amount he has advanced. In the case of *Ambika Debya* v. *Pranhari* (4 B. L. R., F. B., 77; 13 W. R., F. B., 1), the following question was referred to the Full Bench: "Whether an undertenant who has saved the superior tenure from sale by depositing the amount of rent due from the holders of that tenure to the zamindar, is bound to apply to the Collector for immediate possession of the tenure thus preserved from sale, or whether he is competent to sue for the recovery of the amount deposited by him, in the ordinary way, wihthout making any such application." In referring the question, Mitter, J., observed:—"It is quite clear that the last portion of

(iii) Depositor may bring a regular suit.

cl. 4, s. 13, merely amplifies the remedy of the party by whom the advance is made, but it cannot deprive him of the privilege of recovering that advance by an ordinary suit. The amount advanced is to be treated as a loan secured upon a mortgage of the tenure preserved from sale, and the party by whom the advance is made has every right to recover it by an ordinary suit in the Civil Court, *or* by obtaining immediate possession through the Collector. The jurisdiction of the Civil Court has been in no way barred by the provision relating to immediate possession." The Full Bench *held* (overruling *Kartik Sarma* v. *Boido Nath*, 10 W. R., 205) that the undertenant not only has the security of the tenure which he preserved and of which he can obtain possession on application to the Collector, but has also a right to recover the amount deposited as a loan in an ordinary suit. Peacock, C. J., who delivered the judgment of the Court, observed:—"If it (*i.e.*, the money paid to preserve the tenure) is to be considered as a loan, then all the remedies which the law allows for the recovery of loans must apply to this case, unless there are words to show that that was not the intention of the Legislature. I thought at one time that the word "the" before the word "security," was intended to show that the *taluk* preserved was intended to be the only security. But that could not have been the intention of the Legislature, for the owner of an undertenure might have to pay more to save his under-tenure than the superior tenure which he obtains as a security is worth. In order, therefore, to give the holder of the undertenure, who is compelled to pay money in order to save his under-tenure, a sufficient security, he must not only have the security of the tenure which he preserves, but also a right of action to recover the loan, if he considers necessary." *L* and *R*, the holders of a *patni* estate, granted in 1856 a *darpatni* lease to *S* at an annual rent, the lease stipulating that *S* should have full power of sale and gift, but should not sublet without the *patnidars'* consent. The lease contained no stipulation for the registration of any vendee or donee. In 1860, *S* sold the *durpatni* lease to *K*, the deed of sale, which was duly registered, providing for the mutation of names in the *patnidars'* books. No such mutation was ever effected by *K*, who was never recognised as their tenant by *L* and *R*, the rent of the *darpatni* being paid in the name of *S*. In 1864, the rent due from the *patnidars* being in arrears, the zamindar proceeded to sell the *patni* under Regulation VIII of 1819. Thereupon *K*, in order to protect his under-tenure, deposited in the Collectorate, on 17th November, 1864, a sum of money, on which the sale was stayed. *K*, being then in arrears in the payment of his *darpatni* rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L* and *R*. This *L* and *R* refused to allow, and they brought a suit in the Collector's Court against *S* and his sureties to recover arrears of rent. In that suit *K* intervened claiming the benefit of the set-off, to which, however, the High Court, on the 26th June, 1866, on appeal, held that he was not entitled, the deposit being merely a voluntary payment by *K*. On 30th October, 1867, *K* brought a regular suit against *S* and *L* and *R* to recover the amount of the deposit and obtained a decree, but the decision was reversed on appeal and the suit dismissed for want of jurisdiction. On 6th June, 1869, *K* filed his plaint in the proper Court. It was held that he was entitled to recover the amount deposited by him in the Collectorate, and that the suit was not barred as being *res judicata*, by the

decision of the 26th June, 1866—(*Lakhi Narain* v. *Khetra Pal*, 13 B. L. R., 146, P. C.). This decision overrules *Anund Chunder* v. *Soobul Chunder*, S. D. A., (1857) 1159 and *Lukhinarain Mitter* v. *Seetanath Ghose* (6 W. R., (Act X) 8). Compare *Ambica Debi* v. *Pranhari Das*, 4 B. L. R., F. B., 77.

(iv) Defaulter may sue to reverse sale.

Lastly, if in spite of the payment the tenure is sold, a suit will lie for the reversal of the sale. See notes under s. 14 (*post*).

Lien tantamount to a usufructuary mortgage.

Nature of the lien created by Cl. 4.—The fourth paragraph of s. 13 of the Regulation does not create a first charge on the tenure. What it does give the man making an advance under it is tantamount to an usufructuary mortgage of the *patni* (*Ram Jivan Bhadra* v. *Tazuddin Kazi*, 15 C. W. N., 404; 3 C. C. L., 666). A *darpatnidar* saved a *patni*, which was subject to defendant's mortgage, from sale by advancing arrears due and was put in possession of it under clause 4 of s. 13 of the Patni Regulation. The plaintiff, his transferee, paid three more instalments of the *patni* rent, but, for his failure to pay the subsequent instalment, the *patni* was put up for sale and purchased by the defendant mortgagee. *Held* that the plaintiff could not claim any charge on the sale-proceeds in respect of three instalments of the rent paid by him, as he was bound to pay them, but that, as regards the amount which the plaintiff had paid for the original *darpatnidar's* rights, he was at most an usufructuary mortgagee, and, as his mortgage was of later date than that of the defendant, he could not claim priority in a proceeding against the sale-proceeds. (*Ibid.*) Again, a zamindar sold a *patni* for arrears of rent and obtained a decree, but, previous to the institution of the suit, he had sold all his interests in the zamindari. The purchaser of the zamindari subsequently instituted proceedings under Regulation VIII of 1819 for arrears of rent accrued due since the sale, and the *darpatnidar* deposited the rent under s. 13 of the Regulation. In a suit by the *darpatnidar* for a declaration that he had a first charge on the *patni* in respect of the sum deposited by him, it was *held* that the decree, obtained by the former zamindar, was a decree for rent within the meaning of s. 65 of the Bengal Tenancy Act, and constituted a first charge on the *patni* under that section with priority to the lien of the respondent. "The plaintiff," observed the Judges, "as *darpatnidar* in possession has only a 'lien,' not a first charge, on the *patni*. The defendants (appellants) have a first charge on the *patni*. When they sell it, under s. 165 of the Bengal Tenancy Act, they sell it free of all incumbrance. The plaintiff's lien, which is not a registered and notified incumbrance as defined in s. 161 of the Act, is destroyed—even if he has one." (*Maharaj Bahadur Sing* v. *Forbes*, I. L. R., 35 Cal., 737.)

Amount advanced how to be liquidated.

Extinction of the lien.—The amount, advanced by an undertenant to stay the sale, is to be liquidated from the profits of the tenure. The word "profits" in the 4th clause of this section means that which is left to the tenure-holder (*patnidar*) after payment of the rent of the tenure (*patni*). A person, who enters into possession of a *patni* as mortgagee under the provisions of this section, cannot appropriate the whole of the collections to the satisfaction of his own claim. He is bound in the first place to pay the rent, due to the landlord, out of the gross collections before applying the same to the liquidation of his own debt, and the defaulter is not to be liable for the rent of the tenure during the period of the possession by the person so holding it as mortgagee. (*Lala Bhairab Chunder* v. *Lalit Mohon Sing*, I. L. R., 12 Cal.,

185.) "The District Judge," remarked the Judges, "drew a distinction between "profits' and 'net profits,' but we consider that in this section the meaning is what the District Judge terms 'net profits.' For, the section gives the plaintiff the right of possession only for the purpose of recovering the amount advanced by him as described in the earlier part of the clause; and it goes on to provide that the defaulter may recover the tenure by repayment of the entire sum advanced with interest at the rate of 12 p. c. per annum up to the date of the possession having been given as above, or by proving in a regular suit that the full amount so advanced with interest has been realized from the usufruct of the tenure. It thus seems clear to us that the law does not contemplate that the defaulter is also to be held liable for the rent of the tenure during the period of the possession of him who holds it as under a mortgage." As to collection-charges, they observed:— "We think that in any account, rendered by the plaintiff to the defendant, of the profits of the tenure during the period of his possession, the plaintiff is entitled to take credit for moderate collection-charges, but that would only be if the defendant were claiming a refund of the surplus profits over and above the debt for which the plaintiff had possession of the *patni*." In *Brojo Nath Sing* v. *Srimati Bhagabati Dassi* (1 W. R., 133), the plaintiff and one Haridayal, one of the defendants, held a *patni* of 7 villages from the zamindar defendants, Ganga Pershad Gossain and Gopi Kishen Gossain. They defaulted to pay their *patni* rents, and Brojonath Sing and Mohesh Ch. Sing, who held an interest in the *patni*, paid up the balance and were put in possession. They remained so till the 19th of *Ashar*, 1269, when the plaintiff paid into the Collectorate her share of the arrears and recovered from Brojo Nath and Mohesh Chunder the possession of her half share of the estate. She then brought this suit for an account from them during the year they were in possession of the *patni* as mortgagees. *Held* that the proper sum to be allowed to the mortgagees for "*Sarin jamee*" was what the mortgagees had actually spent as expenses of the management. *Held* also that the mortgagees were entitled to interest on account of the balance of the *patni* rent paid by them.

Meaning of Profits.

Collection-charges.

A party in possession under this section can be ousted only by showing that the debt has been paid off (*Baistab Chandra Bhadro* v. *Tara Chand Bannerjee*, 11 W. R., 357). In this case the plaintiff claimed an eight annas share of a *patni* as a purchaser in 1856 from the Official Assignee of an insolvent, Daddally, whom the Principal Suddar Ameen found to have been the owner in his own right by inheritance of the share of the *patni* of which the defendant's ancestor Govind Ram, who was a *darpatnidar*, was in possession, having deposited the arrears of rent for the *patni* in 1852 and taken possession of the *patni* under cl. 4, s. 13 of Regulation VIII of 1819. *Held* that, as at the time of the plaintiff's purchase, Govind Ram was in possession (*i.e.*, that he was substantially in the same position as a mortgagee in possession under a usufructuary mortgage), the plaintiff, just in the same way as a purchaser from such a mortgagor, would have no cause of action until the debt was paid off. Notice, however, that the undertenure-holder, who makes the deposit under s. 13, cl. (4) of *Patni* Regulation, is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his debt has been satis-

Under-tenant cannot be ousted until debt paid off.

But the lien is extinguished as the debt is paid off.

fied, he does continue in occupation, he does so at his peril, and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied (*Jukhomull Mehea* v. *Saroda Prosad Dey*, 7 C. L. J., 604). The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor is a regular suit *essential* to alter the legal position of the parties. The moment the lien is extinguished, the defaulter becomes entitled to recover possession (*Ibid*). "It was suggested," observed Mukherjee, J., in this case, "that it would be necessary for the *patnidar*, who has been deprived of possession, to bring a regular suit to recover possession; and stress was laid upon the concluding words of the last paragraph of s. 13, in which it is stated that the defaulter shall not be entitled to recover his tenure except upon repayment of the entire sum advanced, or upon proof in a regular suit to be instituted for the purpose that the full amount advanced has been realized from the usufruct of the tenure. It does not appear to me to be a reasonable construction of this section to hold that in every case there must be a regular suit by the defaulter against the usufructuary incumbrancer. I am unable to hold that the legislature precluded the possibility of the defaulter obtaining amicable possession from the holder of the usufructuary lien after the dues of the latter have been satisfied."

But regular suit not always necessary.

Limitation.—Where a plaintiff, who had acquired the rights of a mortgagee in a *patni turruf*, had foreclosed the mortgage under a decree of the Supreme Court in 1852, but had omitted to take out execution until 1869, when he first sought to obtain possession, and the defendant put in a claim to the *turruf* on the ground that his predecessor in title had, as *darpatnidar*, paid in the revenue to save the *patni*, and had taken possession of the estate under s. 13, Regulation VIII of 1819, and the Lower Courts found that the plaintiff was entitled to recover possession, because the *darpatnidar* had recovered the amount of his deposit in the intervening years, it was *held* by the High Court that the plaintiff's claim was barred by limitation, and that the *darpatnidar's* occupation of the *patni*, after his lien on it had expired, was an adverse possession, which the plaintiffs were bound to resist as soon as they became aware of it; further, that this obligation was not loosened by the fact that the mortgagees, on the expiry of their lien, were bound to find out the owners and deliver up the estates to them (*Kanti Chunder Mukherjee* v. *Baman Dass Mukherjee*, 25 W. R., 434).

Jurisdiction.—The plaintiff purchased a *patni* right in execution of a money-decree obtained against the defendant. Subsequent to the plaintiff's purchase the zamindar put up to sale, for arrears of rent, the *patni taluk* under Regulation VIII of 1819, and the plaintiff, to protect her own interests in the *taluk*, paid to the zamindar the arrears due, and brought a suit in the Munsiff's Court to recover from the defendant the amount which she had been compelled to pay. The Munsiff gave the plaintiff a decree which, however, on appeal was reversed by the District Judge. On appeal to the High Court, it was *held* that the case lay under s. 69 of the Contract Act, and that cases, falling within the provisions of ss. 69 and 70 of the Contract Act, are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. No second appeal would, therefore, lie. The Judges declined to follow the case

of *Rambux Chittangeo* v. *Madhoo Sudhan Pal Chowdhury* (B. L. R., Sup. Vol. 675 ; 7 W. R., 377), remarking that that case was decided before the Indian Contract Act was passed, and that, therefore, they were at liberty to consider the case independently of the considerations which formed the ground of the decision of the High Court in the case of *Rambux Chittangeo* v. *Madhoo Sudhan Pal Chowdhury* (*Kisto Kamini Chowdhurani* v. *Gopi Mohan Ghose Hazra*, I. L. R., 15 Cal., 652).

Sale not to be stayed unless arrear claim be lodged.

14. *First.*—Should the balance claimed by a zamindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve, in the manner provided for in sections 9 and 10 of this Regulation ; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged.

But suit to lie for its reversal.

It shall, however, be competent to any party desirous of contesting the right of the zamindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zamindar for the reversal of the same, and, upon establishing a sufficient plea, to obtain a decree with full costs and damages.

The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zamindar or person at whose suit the sale may have been made.

Defaulter may apply for summary investigation.

Second.—In cases also in which a *talukdar* may contest the zamindar's demand of any arrear, as specified in the notice advertised, such *talukdar* shall be competent to apply for a summary investigation at any time within the period of notice ; the zamindar shall then be called upon to furnish his *kabuliyat* and other proofs at the shortest convenient notice, in order that the award may, if possible, be made before the day appointed for sale.

Sale not to be stayed unless amount claimed be deposited.

Such award, if so made, will of course regulate the ulterior process ; but, if the case be still pending, the lot shall be called up in its turn, notwithstanding the suit ; and if the zamindar, or his agent in attendance, insist on the demand, the sale shall be made on his responsibility, nor shall it be stayed, or the summary suit be allowed to proceed, unless the amount claimed be lodged in cash, or in Government securities, or in currency notes by the *talukdar* contesting the demand ; and if such deposit be not made, the alleged defaulter will have no remedy, but by a regular action for damages and for a reversal of the sale.

Notes.

Amendment.—The words "currency notes" have been substituted for the words "notes of the Bank of Bengal" by Act I of 1903.

Only those who have recognised interest.

Who can lodge the amount of demand.—Clause 1, s. 14, Regulation VIII of 1819, does not contemplate that any party may, by depositing the amount due, stay a sale of a *patni*, but only a party having a recognised interest in such *patni*. There is nothing in the law for the sale of the *patni* which states that strangers without interests in the tenure may acquire any rights. The policy of this and of the Revenue Sale Law is the same, *viz.*, to protect those who are shown to have interests, when the property, in which they have those interests, is brought to sale for the default of others. (*Kisto Jiban Bakshi* v. *A. B. Mackintosh*, Spl. W. R., 53). So, where the mortgagee of a *patni taluk* paid a certain sum of money to prevent the sale of the *taluk* for arrears of zamindari rent, it was *held* that this was not a voluntary payment, and could not be so considered even in the case where the mortgagee, by a covenant in his mortgage-deed, had insured himself against loss by such sale (*Mohesh Chandra Bannerjee* v. *Ram Prosunno Chowdhury*, I. L. R., 4 Cal., 539). In *Saroda Kumari Dassi* v. *Mohini Mohon Ghosh* (20 W. R., 272), the plaintiff's mother sued to recover a portion of a *taluk* which she claimed under a will, and which she would be entitled to upon the death of the widow of the deceased owner. While the suit was pending, the *taluk* was put up for sale under Regulation VIII of 1819, and, to prevent its being sold, she paid the arrear. The suit abated by her death, and the title she set up in it under the provisions of the will remained undetermined. The plaintiff now sued the shareholders in the *taluk* to recover the amount so paid, and it was *held* that the interest of the plaintiff's mother in the *taluk* was such as entitled the palintiff to recover the money. "Treating her (plaintiff's mother)," observed Couch, C. J., "as respect that part of the case (*i.e.*, the claim under the will) as being only a claimant under a title which may or may not be good, she was at all events interested in the preservation of the tenure, as being entitled to succeed to it upon the death of the widow. We think that that was such an interest as entitled the present plaintiff to recover, from the defendants, the money, which had been paid in discharge of the rent for which their property was liable, and for which it might have been sold." Similarly, to save a *patni* from sale for arrears of rent of a former year which had been adjudged by an apparently valid decree to be due from the defendant, the plaintiff paid the money. *Held* that the payment was made under such circumstances as entitled the plaintiff to recover back the money from the defendant (*Andrew* v. *Larimore*, 2 Ind. Jur., O. S., 4; 1 Hay., 309). In *Gopal Chunder Chuckerbutty* v. *Udoylall Dey* (10 W. R., 115), again, a *patni* tenure, which had been attached by *G* in execution of a decree against *D*, was claimed by *S*, whose claim was allowed. Upon this, *G* instituted a suit against *S* and others to have the *patni* declared to be the property of *D*, and, being successful, had the *patni* sold in execution of his decree against *D*, became the purchaser and got possession. After this he saved the estate from being sold for arrears of rent which had accrued prior to his purchase, by paying up the amount due. He subsequently sued *D* and *S* to recover the amount so paid. *S*, who had in the meantime appealed to the Privy Council,

succeeded in obtaining a reversal of the decree under which *G* had sold the *patni*, but this reversal did not take place until after *G* had instituted the suit for recovering the arrears he had liquidated, nor until after *S* had expressed his readiness to pay the amount claimed, if the plaintiff (*G*) would acknowledge his title. It was contended on behalf of *S* that the payment made by the plaintiff was not made for his benefit or at his request, and that he cannot be liable for it, as the plaintiff had all along denied his title. It was, however, *held* that *G* was entitled to recover from *S* the amount which had been paid by him to save the *patni* from being sold. Bayley, J., remarked:—"I am of opinion that the proper test by which to try whether plaintiff's payment was legal or officious as to *S* (Sreemunt Chunder), is to see in whose behalf it would have been legal to make the payment, and then to see if *S* is that person. It is true that at the time *G* (plaintiff) made the payment, he considered the *patni* rents should have been paid by *D* as proprietor for *Aghran* to *Magh* and by himself as proprietor from *Magh* to *Bysak*. But, throughout, the payment was made in behalf, not of the individual, but of any person occupying the character and the position of the proprietor, and the *patni* was in fact saved on such payment for the proprietor, whoever he might be. Now, as by the decision of H. M.'s Privy Council, *S* is declared that proprietor, and the *patni* has been saved by that payment to the proprietor, *viz.*, now *S*, can the payment be deemed an officious, and not a legal payment? I think it must be considered a legal payment as against *S* as proprietor, and therefore recoverable from him." Macpherson, J., remarked:—"The rent which was in arrear was in the nature of a charge upon the land; and the payment, made by the plaintiff (*G*), was made *bonâ fide* in the course of business in the management of the estate. Moreover, it was a payment which it was necessary to make in order to preserve the property. Under such circumstances, the plaintiff (*G*) is entitled to be reimbursed the amount expended by him, by those for whom the *patni* had been thereby saved. *S*, having succeeded in the Privy Council, and having been restored to possession, his state is liable even although the plaintiff did formerly deny his right." The plaintiff, who was the mortgagee of a certain *patni taluk*, obtained a consent-decree for Rs. 35,000 on his mortgage bond on the 13th August, 1888. In the *solenamah* it was stipulated that, if the decretal amount were not paid within a certain date, it was to be increased to Rs. 52,000. On the 14th March, 1891, the plaintiff applied for the execution of that decree and claimed the larger amount, as admittedly the smaller amount had not been paid within the stipulated period. The Subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and, on 31st September, 1891, the order of the Subordinate Judge was reversed, and an enquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August, 1892, the Subordinate Judge held that the plaintiff had been guilty of misconduct, and that the decree had been fully satisfied. The plaintiff appealed from this order to the High Court, and, on the 4th January, 1894, the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime, on the 13th May, 1892, the plaintiff had paid a certain sum of money to protect the *patni taluk* from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid, it was *held* that the

payment was not a voluntary payment, and that the plaintiff was interested in the payment of the money, and that, therefore, he was entitled to recover it. (*Bindubashini Dasi* v. *Horendro Lall Roy*, I. L. R., 25 Cal., 305.)

But the purchaser of a *patni* sold in execution of a decree cannot recover from the original *patnidar* the sum which the purchaser had to deposit a few days after his purchase, in order to stay a sale by the zamindar under Regulation VIII of 1819. The purchaser at the auction must be held to have bought the tenure with all its liabilities, one of these being the instalment due to the zamindar at the approaching period for sales under Regulation VIII: the original *patnidar* was not bound to pay his rent then, for he might have allowed his tenure to be put up for sale by the zamindar (*Khoda Bux* v. *Degumbari*, Spl. W. R., 207). In another case the plaintiff purchased a certain *jote jama* at an auction sale, held in execution of a decree against the defendant who was at that time in possession, and obtained possession of it. After the *jote jama* had come into the possession of the plaintiff, the *patnidar*, under whom it was held, obtained a decree against the defendant for arrears of rent, which had become due during the time of the possession of the defendant and before the purchase of the plaintiff, and attached the property with a view to selling it under an order passed by the Collector. At this stage the plaintiff, to save the tenure from sale, paid the amount of the decree against the defendant, and then brought a suit to recover the amount from the defendant. *Held* that the payment was a voluntary one made without legal necessity, as, had the sale been proceeded with in the Collector's Court, nothing could have passed by it, and the plaintiff would have been in no way damaged in his proprietary rights. Consequently, the amount was not recoverable by suit against the defendant. (*Rambux Chulangea* v. *Hridoy Monee Debea*, 10 W. R., 446.)

S. 69 of the Contract Act.

Contribution.—See s. 69 of the Indian Contract Act. That section lays down as follows:—"A person, who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other." This section has been interpretated to contemplate a case where the person, who makes the payment, is under no legal liability to make it, and he pays the money for another person, who is bound in law to pay. In that case, the former is entitled to call upon the latter to make good the amount that he has paid (*Manindra Chandra Nandy* v. *Jamahir Kumari*, I. L. R., 32 Cal., 643). Consequently, a share-holder, who pays up arrears of rent due from the whole of the tenure in order to save it from sale in execution, is entitled to recover contribution from the other share-holders who were in possession during the period within which the arrears accrued, even though the tenure should be in the name of another and the decree be nominally against such other alone (*Asadoollah* v. *Monshee*, 22 W. R., 531). Similarly, a *patnidar* making payments on account of Government revenue, which his superior landlords have failed to pay, is interested in doing so within the meaning of s. 69 of the Contract Act (*Smith* v. *Denonath*, I. L. R., 12 Cal., 213). So also where the mortgagee of a share of a *patni taluk*, in order to save his interest therein, paid up the *patni* rent and claimed to recover a proportionate share thereof from the appellant, who had, subsequent to the mortgage, purchased the mortgagor's share in the *taluk*, and where the appellant pleaded that he was only a *benamidar* for the

Shareholder paying entire rent is entitled to contribution.

A patnidar paying Govt. revenue is entitled to contribution.

mortgagor, it was *held* that the appellant having held himself out as the purchaser, and having got his name registered in the zamindar's books in place of his vendor, was *prima facie* bound in law to pay the rent, and that, under s. 69 of the Contract Act, the mortgagee was entitled to succeed (*Umesh Chandra Bannerjee* v. *Khulna Loan Company*, I. L. R., 34 Cal., 92). But the purchaser of a *patni* paying money to save it from being sold in execution of a decree for arrears of rent which accrued before the date of his purchase, is not entitled to recover the amount from a former *patnidar*, as rent is always a first charge, and the purchaser takes the *patni* subject to the liability to pay the arrears of rent (*Maharani Dasya* v. *Harendro Lall Roy Chowdhury*, 1 C. W. N., 458). The same view was taken in the case of *Manindra Chandra Nandy* v. *Jamahir Kumari* (I. L. R., 32 Cal., 643). In that case, *A* mortgaged a certain *taluk* to *B*, who brought a mortgage suit and, in execution, brought the property to sale, and bought it himself. In the meantime, the rent due to the zamindar had fallen into arrears, and the zamindar obtained a decree for the rent due for the period antecedent to the confirmation of the sale at which *B*, the mortgagee, had purchased the property and, in execution thereof, advertised the *patni* for sale. The mortgagee, to save the property, paid in the amount of the decree, and afterwards sued the mortgagor for contribution. *Held* that a mortgagee, who purchases a *patni* at an execution-sale, is under a legal liability to pay the rent due upon the property at the time of the purchase, and cannot, therefore, claim, under s. 69 of the Contract Act, contribution from the mortgagor. "It is obvious," observed the Judges, "that the plaintiff being under the legal liability to pay the rent that was due upon the property, when he made the purchase, could not be regarded as a person who, under s. 69 of the Contract Act, was entitled to call upon the defendant to make good the amount he paid. It may well be said that the defendant having been in the enjoyment of the rent and profits of the property during the period in question, is bound in equity to make good what the plaintiff paid for him; but we do not know whether the plaintiff when he made the purchase, subject to the liability of paying the rent then due, did not succeed in making the purchase at a lower price than he would have had to pay, or anybody else would have paid, if the property were sold free from such liability. If he, by reason of the liability existing upon the property, purchased it at a less price, it is not equitable that he should be entitled to call upon the defendant to make good what he had to pay in order to free the property from such liability."

Mortgagee of a share paying entire rent entitled to contribution.

But not a purchaser paying arrears accruing before date of purchase.

Nor a mortgagee in a similar case.

Notice that in a suit for contribution, where a joint decree cannot be passed, the specific liability of each co-sharer must be not only alleged, but clearly established (*Pitambar Chuckerbutty* v. *Bhairab Nath Palit*, 15 W. R., 52).

In a contribution-suit joint decree cannot be passed.

When a *patni*, sold for arrears of rent, is purchased by one of the *co-patnidars*, defaulters, the sale is not absolutely void, but only voidable, and the property would remain in the purchaser until the sale is avoided. A suit, therefore, brought, after such avoidance by the purchaser, for contribution for arrears of rent paid by him, while in possession, against his *co-patnidars*, would not be barred if brought within 3 years from the date of the avoidance. Time begins to run from such date and not from the date of payment. Art. 61 of

Limitation.

the Limitation Act would apply. (*Matangini Debya* v. *Prosonnomoyi Debya*, 2 C. L. J., 45*n*.)

Equity.

Equity between co-sharers.—A *patni taluk* being about to be brought to sale under Regulation VIII of 1819, the agents of the sharers were in attendance at the Collectorate on the day of sale, prepared to pay the rent due. Two of the agents (*G* & *B*) happening to be out of the way at the time the lot was about to be called up, the third (*K*), without informing the Collector or zamindar's agent of their intention to pay, or giving notice to the others, purchased the *patni*. It was *held* that *K's* act was one of bad faith, and that the four annas shareholders, whom he represented, could not in equity be allowed to benefit by adopting the fraud, and that, although as between the Collector, the zamindar and the defaulting *patnidars*, the sale was valid, it was void so far as it created a title in favour of the four annas shareholders. *K*, it was observed, must be treated as having made the purchase on account of, and as trustee for, twelve annas shareholders (*Koylash Chandra Bannerjee* v. *Kali Prosunno Chowdhury*, 16 W. R., 80).

Cases in which money must be paid into Court.

Payment to be made to whom.—The payment can be made either (1) into Court or (2) to the zemindar. It can be made into Court only either by a "*talukdar* of the 2nd decree" under the provisions of s. 13, or by a *patnidar* applying for a summary investigation under cl. 2, s. 14. In any other case the payment must be to the zamindar, there being no provision in Regulation VIII of 1819 empowering a *patnidar* to bring money into Court except in the case provided by cl. 2, s.14. Thus, where a *darpatnidar* sued to recover, from the *patnidar*, the amount which he had paid to the zamindar on account of the latter, but which was not sufficient to stay the sale, it was *held* that the *patnidar* is not liable to make good the *darpatnidar's* payments to the zamindar, insufficient as they were to stop the sale of the *patni*, and that such payments must be made under the law into Court (*Mirza Mohomed Hossein Ali* v. *Bakarulla*, 6 W. R., 84). The direction in s. 13 of Regulation VIII of 1819, that money paid into "Court" by a *talukdar* in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or months for which the notice of sale may have been published, is satisfied by payment, not into "Court," but to the zamindar. If a strictly literal construction were put upon the words "into Court," no payment effectual to stay the sale could be made, for "Court" has nothing to do with the sales, which are managed by the Collector (*Tarinee Debee* v. *Shama Charan Mitter*, I. L. R., 8 Cal., 954). In *Kristo Mohon Shaha* v. *Aftabuddin Mahomed* (15 W. R., 560), again, an instalment of rent having been due from certain *patnidars*, a proclamation was issued, under the provision of Regulation VIII of 1819, fixing the day of sale. Before the day, a sum of money sufficient to cover the arrears was deposited in the Collectorate by one of the *patnidars*, the payment being made to the Collector's accountant, who gave a receipt for it; but no intimation of the payment was given to the Collector or to the zamindar. Accordingly the sale proceeded, and the *patnidars* now sued to have it annulled. *Held* (Mitter, J., dissentiente) that there is nothing in Regulation VIII of 1819 which empowers a *patnidar* to make a deposit either in the Judge's Court or in the Collectorate before the day of sale, or which gives to such payment, if made, the effect of a payment to the zamindar or to his agent, and that the

Darpatnidar must pay into Court.

Patnidar must pay to zamindar.

plaintiffs had no ground to ask for relief on any principle of equity. It is not competent to a defendant to bring money into Court privately and secretly, on an *ex-parte* application, and without giving notice to the plaintiff either of his intention to pay, or of the fact that the money has been paid into Court and may be taken out by the plaintiff. Macpherson, J., observed in this case :—"For the zamindar and purchaser, it is contended (and it appears to me rightly) that the *patnidars* are not entitled to treat the payment of the money into Court as a payment to zamindar, and that, therefore, the balance claimed by the zamindar did remain unpaid at the time of the sale, which consequently cannot be impeached.....There is nothing in Regulation VIII of 1819 which either expressly or impliedly declares that a payment such as the *patnidars* in this case made shall be deemed to be payment to the zamindar. It is expressly declared that the '*talookdars* of the second degree' may stay the sale by paying into Court the money declared due on the day of sale, or lodging or depositing the money antecedently for the purpose of eventually answering any demand that may remain due on the day fixed for sale....There is no such declaration as regards *patnidars* or *talookdars* of the first degree. On the contrary, the language of Regulation VIII shows rather that the only case, in which it was contemplated that the *patnidar* was to bring the money into Court, was that provided for in cl. 2 of s. 14, the case of the zamindar's demand being contested, and the *patnidar* applying for a summary investigation.....As to this clause (cl. 1, s. 14), I think that its proper interpretation is that the sale is not to be stayed or postponed on any account, unless the amount of the demand be lodged in the sense in which alone the word *lodged* is used in Regulation VIII, *i.e.*, lodged by a '*talookdar* of the second degree' under the provisions of s. 13, or lodged by a *patnidar* applying for a summary investigation under cl. 2 of s. 14. The word *lodged* as used in cl. 1 of s. 14, has, to my mind, no legal meaning save such as is to be gathered from the use of the word in s. 13 and in cl. 2 of s. 14. If the word "*lodge*" in cl. 1 of s. 14 is read in this limited sense, there is absolutely no ground for saying that Regulation VIII anywhere contemplated the *patnidar's* bringing into Court the arrears claimed by the zamindar except in the one case provided for by cl. 2 of s. 14. There being thus nothing in the Regulation which makes a payment into Court of itself a payment to the zamindar, I think it is impossible to say that, under the circumstances which occurred in this instance, the balance claimed by the zemindar did not remain unpaid upon the day fixed for the sale."

Cl. 1, s. 14, interpreted.

The Board of Revenue have laid down the following rule on the subject: Collectors should not receive payment of arrears due from *patnidars*. Such payment should be made to the zamindars direct, except when a *patnidar*, a *talukdar* of the first degree, contests the demand of an arrear made by the zamindar, in which case deposit must be accepted to stay the sale. This ruling does not affect *darpatnidars*, who came under the provisions of cl. 2, s. 13 of the law (see Rule 5, Part III, section VIII, p. 114 of the Board's Manual).

Board's Rule.

How should the amount lodged be dealt with.—The money lodged under cl. 2 of this section by the *patnidar* applying for a summary investigation is to be held in deposit until the enquiry made by the Collector is decided, and not until the decision of the Civil Court (if a suit is instituted) is obtained. If the

Board's Proceedings.

Collector finds on summary enquiry the patnidar's objection invalid, he should pay the amount over to the zamindar who will take it subject to his liability to a civil suit. If, however, the Collector decides in favour of the *patnidar*, he should return the amount, or such portion of it as he may determine, to the *patnidar* (Board's Miscellaneous Proceedings of 23rd July, 1881, No. 162, Collection 7, File 2796 of 1881).

Two ways of staying a sale.

When may a sale be stayed.—We have seen that a sale may be stayed in two ways, *viz.*, (1) by an under-tenant paying, on the date of the sale, the amount claimed to be due before the lot has been called up, or by lodging a sum any day before the sale; and (2) by a *patnidar*, who contests the arrear under cl. 2 of s. 14 of Regulation VIII of 1819, lodging the amount after the lot has been called up for sale. A question was raised as to whether a Collector is competent to postpone the sale of a *patni taluk* for any period with the consent of the zamindar. The Board ruled that the sales of *patni* tenures cannot be postponed as the law is imperative on this point.—(Board's Miscellaneous Proceedings of the 1st October, 1852, No. 20). A Collector refused to stay the sale of a *patni taluk*, on the ground that the agent of the zamindar (who had previously insisted on the sale proceeding) asserted that he had received the balance, although he had not quitted the Court or communicated with anyone during the interval. The Commissioner justified the Collector's action by quoting cl. 2 of s. 14. The Board held that the Collector had acted illegally, and that, when the agent declared that he had received the balance, it was not for the Collector to decide upon the truth or falsity of the statement. It was sufficient that it had been made, and, on the strength of it, the sale should have been stayed. They also pointed out that the clause referred to by the Commissioner had no bearing, as in this case the arrear had not been contested in a summary suit (Board's Miscellaneous Proceedings of 17th April, 1857, No. 11). The Board declined to interfere in an appeal against the order of a Commissioner, upholding that of a Deputy Commissioner, who had decided to put a *patni* up to sale if the arrears claimed by the zamindar were not paid down, notwithstanding the pendency of a suit in the Civil Court for abatement of the rents claimed. But they observed that the Deputy Commissioner should have made an award. The order, that the sale could only be stayed if the arrear demanded was lodged, could not be called an award. Further, it was brought to notice that the amount of arrear had been lodged. Lodging the arrear demanded is the condition imposed on all objections to proceedings of the zamindar, but when the objector is the defaulter, the question as to sale or no sale has to be decided in a summary investigation by the officer presiding and his award is final (Board's Miscellaneous Proceedings of 1st August 1865, No. 22).

A sale cannot be indefinitely stayed.

Board's Proceedings.

A sale must be stayed on the statement of zamindar's agent.

Board's Proceedings.

Sale may proceed although there is a suit for the abatement of the rent claimed pending in Civil Court.

Board's Proceedings.

Payment of costs.—If a zamindar refuses to accept payment of the arrear on the ground that the amount tendered does not cover his costs, and insists upon the sale of the *patni* tenure, the Collector must sell on the zamindar's responsibility, but there can be no doubt that the Civil Court would set such a sale aside. If, however, the zamindar accepts the tender of the arrear, but calls upon the Collector to proceed with the sale on the ground that the costs have not been paid, the Collector should refuse to sell (Board's Miscellaneous Proceedings of 11th September, 1880, No. 146, Collection 7, File 2332 of 1880). The Collector cannot refuse to abstain from

What happens when costs are demanded by zamindar.

sale on the ground of non-payment of expenses (Board's Miscellaneous Proceedings of 19th April, 1873, No. 73). It was held by a Commissioner that a zamindar's agent is not entitled to charge a *patnidar* fees for filing a petition against him, when the *patnidar* pays in full the amount due by him before the sale day appointed under this Regulation, and when there is no dispute as to the amount due by the *patnidar*. The Board concurred in the view that no expenses could be recovered, but *held* that this section allows by implication the payment of arrears of rent to be made on the day fixed for the sale (Board's Miscellaneous Proceedings of 28th December, 1872, No. 146.)

Board's Proceedings.

Summary investigation.—A *patnidar* may apply for a summary investigation, at any time within the period of notice, in cases where he may contest the zamindar's demand of any arrear. Observe, however, that although this investigation is held in a summary suit, the sale is not to be stayed till that suit is decided (*Kistomohun Shaha* v. *Aftaboodeen Mahomed*, 15 W. R., 560). A Collector postponed the sale of a *patni* tenure, pending the decision of a summary suit brought by the *patnidar* contesting the zamindar's claims. The Board *ruled* that the Collector was not competent to postpone the sale, and to decide the summary suit after the date fixed for the sale. As no award had been given on the day of the sale and the case was still pending, the Collector had no option but to proceed with the sale on the zamindar insisting on the demand and on his (the zamindar's) responsibility, as the amount claimed had not been lodged by the *patnidar* as required by cl. 2 of s. 14. If the Collector was of opinion that the sale could not proceed because the zamindar did not file the *patnidar's kabulyat*, the case ought to have been struck off on the day of the sale (Board's Miscellaneous Proceedings of 10th March, 1860, No. 15). A Commissioner of a Division enquired whether, upon proof of a *taluk* not being saleable under this Regulation, the Collector can stay the sale or entertain any objection based upon the nature of the *taluk* and urged before the sale actually takes place. The Board *held* that, under this section, the Collector may take up points connected not only with the amount of the claim, but with the saleable character or otherwise of the tenure, and that he is warranted in cases of doubt to call on the zamindar to show that he is only entitled to make the application provided for in section 8, and to produce the engagement in which the right of sale is reserved (Board's Miscellaneous Proceedings of 3rd June, 1853, No. 92). A petition was presented to the Board against the orders of a Collector and of a Commissioner ordering the registration of the name of a certain person as the proprietor of a *mahal*, and striking off the case instituted by the petitioners for realisation of *patni* rent. The Board observed that the *patni* law was not relevant to the question of title between the two zamindars claiming the right to have the notices issued for the sale of the *patni* tenure, and ruled that the Collector was not warranted, or empowered by the law, to entertain and decide such questions on the day of sale, that he should have issued the notices on the petition of both the parties, and if he could not decide the mutation case pending before him, previous to the date of sale, he should, if any objection had been offered by the *patnidar* to the demand of either claimant, have called for the *kabulyats*, and other proof, and by a summary enquiry have regulated the ulterior process of

Patnidar may demand summary investigation.

But the sale cannot be stayed till the summary suit is decided.

Board's Proceedings.

Scope of the summary investigation.

Board's Proceedings.

sale. If no objection had been made to the demand of either party and the arrear still remained due, the Collector should have proceeded to sell on the petition of the party registered in his office as the proprietor, leaving the question as to the right of sale, &c., to be contested and settled in the Civil Court (Board's Miscellaneous Proceedings of 19th February, 1858, No. 13).

Collector cannot review award.

Notice that a Collector cannot review his own award in a summary suit. It has been ruled by Government that a Collector cannot review his own judgment in a summary suit, nor can the Commissioner or the Board authorize him to re-investigate a summary case, when once decided (Board's Circular Order No. 4 of March, 1849). A petition was presented to the Board against the order of a Commissioner confirming that of a Collector by which the latter officer set aside, of his own authority, a former award of his passed in a suit for the recovery of arrears of rent under this Regulation. The Board held that the Collector is not authorized to review a summary award which he has made under this section. Because there is no appeal against such an award, it did not follow that the Collector can alter an award once made. If injustice was done by the first award, the constitutional and proper remedy to the injured party is a suit in the Civil Court. In the present case, the Board rejected the appeal as no action on their part would revive the relations of the two parties as they were on the day of the Collector's award (Board's Miscellaneous Proceedings of 18th July, 1865, No. 20).

Board's Proceedings.

A patnidar may bring a suit to reverse a sale.

Reversal of the sale.—If the sale has actually taken place, the only remedy open to a *patnidar* is to bring a suit for a reversal of the sale and for damages. The grounds, on which a sale may be set aside, are the non-publication or irregular publication of any of the notices (see notes under s. 8) or any other cause, *e.g.*, want of arrears. If there was no arrear of rent at the date of the sale, whether notice of the fact had been given to the Collector or not, the sale must be set aside. A summary enquiry as to the fact of an arrear may indeed be made, but it is not imperative on the *patnidar* to demand such an enquiry: he may reserve the question for a regular suit, and, if it appears that there was no arrear, the Court is, under cl. 1, s. 14, to take care that the purchaser is indemnified against loss accruing by reason of the sale being in consequence set aside (*Sarup Chandra Bhowmik* v. *Rajah Pertab Chunder Sing*, 7 W. R., 219; 3 R. C. & C. R., 148). See also *Ramsona Chowdhurani* v. *Sonamala Chaudhurani* (3 C. L. J., 658). Inadequacy of price is, however, no ground for setting aside a *patni* sale regularly held. The sale does not compel bidders to give a fair price; it is sufficient if notice is given to intending purchasers that the sale is going to take place (*Mungazi Chuprasi* v. *Shibo Sundari*, 21 W. R., 369).

Grounds on which a sale may be reversed.

An unregistered defaulter or unregistered co-sharer of a defaulter may sue.

Who can sue to set aside the sale.—An unregistered defaulter, or an unregistered co-sharer of the defaulter, may bring a suit to set aside the sale in the proper Court and on full valuation, and may be entitled to a decree on a sufficient plea being made out. A *patni taluk*, having been purchased at a sale for arrears, was subsequently, by private sale, transferred to the plaintiff who, however, omitted to get his name registered as a *patnidar*. Thereupon the zamindar sold up the *patni* a second time and bought it up himself. The plaintiff then sued to have the sale set aside, and it was *held* that, as the plaintiff had omitted to have his name registered and had not shown that

he had taken any steps to get his name registered, he was not in a position to sue to set aside the sale (*Gossain Mongal Dass* v. *Babu Roy Dhanpat Sing Bahadur*, 25 W. R., 152). In *Raj Narain Mitter* v. *Ananta Lall Mandal* (I. L. R., 19 Cal., 703), however, it was *held* that the palintiffs, who were *de facto* and *de jure patnidars* in the room of their deceased father, were entitled to maintain a suit to set aside a *patni* sale, although they were not registered as *patnidars*, section 14 of the Regulation expressly giving the right to sue to any party desirous of doing so. So also in *Chunder Pershad Roy* v. *Subhadra Kumari Shaheba* (I. L. R., 12 Cal., 622), where the plaintiff, an unregisterd proprietor of a *patni* tenure, sued to set aside a *patni* sale, held under Regulation VIII of 1819, in consequence of certain irregularities, it was ruled that he was entitled to sue for a reversal of the sale under the provisions of s. 14 of the Regulation. "It seems to us," observed the Judges, "that the words 'any person desirous of contesting the right of the zamindar' (in cl. 1, s. 14) are wide enough to include a person in the position of the plaintiff who is interested in the maintenance of the tenure which he holds....It seems to us that, although the zamindar is not bound to recognize any one except the registered tenant in any proceedings taken with reference to any matter connected with the tenure, it is nevertheless open to any person interested in that tenure, or, as the law puts it, 'desirous of contesting the right of the zamindar,' to sue him on account of any illegal act by which his rights may have been affected in respect to that tenure. If it were not so, a neglect to register might entail an absolute forfeiture." Again, where a *patni* sale under Regulation VIII of 1819 was set aside by the Lower Court on the grounds, *inter alia*, that the proclamation of sale was not served according to law, and that the property had been sold for an inadequate price, and where it was contended, on appeal, that, even if the Lower Court was right in the conclusion of fact at which it had arrived that the advertisement of sale was not served, still this suit could not be maintained because the plaintiff, although he was interested in the *patni*, was not, and never had been, registered in the *sherista* of the zamindar as the owner of the *patni*, and that without such registration the suit could not, under the provision of the Regulation, be maintained, it was *held* that the section indicated that it was the intention of the Legislature that a suit of this kind might be maintained by a person other than the registered proprietor of the *patni*. (*Joykrishna Bandopadhya* v. *Sarfanneesa*, I. L. R., 15 Cal., 345). The question as to the exact position of an unregistered *patnidar* in such cases was discussed in this case, and Petheram, C. J., who delivered the judgment of the Court, observed :—"An objection is made as to the form of the decree, and that objection is that the decree, in effect, puts an unregistered assignee in possession. That may or may not be the case, but what the parties are entitled to, after this sale is set aside, is that they are entitled to be reinstated in the same position as they were in before; and if, as a matter of fact, the assignee was in possession as before, it may be that, so far as the landlord is concerned, his possession was only the possession of the assignor; but if he was in possession by some arrangement with the *patnidar*, I think he is entitled to have the sale set aside, and that the effect of setting aside the sale will be that the parties must be reinstated in their original position. If he was in possession before, he will be in possession

Exact position of an unregistered tenant in such cases.

again; but, until he is registered, he cannot be in possession as a tenant to the zamindar. His possession will be that of a *patnidar*, whether jointly with him or under some arrangement with him; but his rights are to be reinstated in the position he was in before the sale took place."

One of several co-owners may sue.

Similarly, one of several co-owners of a *patni taluk* alone can institute a suit to set aside a *patni* sale as contemplated by s. 14 of Regulation VIII of 1819, provided the purchaser is made a party and the whole sale is sought to be set aside (*Gaudadhar Sircar* v. *Khaja Abdul Aziz*, 14 C. W. N., 128). So also can an undertenure-holder, whose tenure is voidable on the sale (*Annoda* v. *Erskine*, 12 B. L. R., 370; 12 W. R., 68), and a mortgagee. The latter has this right even if a notice under s. 167 of the Bengal Tenancy Act annulling the mortgage, has been served on him (*Brij Kumar Roy* v. *Dhanukdhari Raut*, 10 C. W. N., 976).

And an under-tenure-holder.

And a mortgagee.

Who can reverse the sale.—The Commissioner has the power to set aside a sale held under Regulation VIII of 1819 on the ground of irrelevancy of law or procedure, or on proof of payment of the entire rent before the date of sale. (See s. 13, Act VIII of 1865.) Besides this and the remedy by a summary investigation before the sale, the defaulter, or any party interested in contesting the validity of the sale, may sue the zamindar and the purchaser in a Civil Court for a decree for the reversal of the same. The Board have ruled that no appeal lies to a Commissioner under s. 13 of Bengal Act VIII of 1865 against the sales held (without decree obtained) under the summary procedure of Regulation VIII of 1819. On the same ground they have held that the powers of revision given to Commissioners and to the Board by s. 14 of the Act apply only to sales of under-tenures after decrees obtained. Commissioners are, however, to take notice of any irregularities which may come to their notice with regard to such sales, with a view to preventing the repetition of them. (Rule 6, section VIII, Part III, p. 114 of the Manual.)

Board's Rule.

Where should the suit be brought.—See s. 19 of the Civil Procedure Code. A suit to set aside a sale held under the *patni* Regulation may be brought in any one of the several Courts in whose jurisdiction the property, or a part thereof, is situated, although the sale was held in the Collectorate of a district other than that in which the suit is to be brought (*Beni Madhab Dass* v. *Jotindro Mohan Tagore*, 11 C. W. N., 765). A *patni* was sold in the Collectorate of Burdwan and a suit was instituted to set aside the sale in the Court of the Sub-Judge of Hooghly in whose jurisdiction a portion of the property was situated. The Court returned the plaint for presentation to the proper Court. The plaintiff took it back and presented it to the Burdwan Court: *Held* that, having regard to the action of the plaintiff in presenting the plaint to the Burdwan Court, *i.e.*, in accepting and acting under the order of the Hooghly Court, it is not open to him to appeal from the order returning the plaint. (*Ibid.*)

Purchaser must be indemnified against all losses.

The purchaser must be indemnified.—The zamindar as well as the purchaser is a necessary party in a suit for the reversal of a sale. If the sale be set aside by the Civil Court, the zamindar is liable to pay full costs and damages and also to indemnify the purchaser against all losses. Thus, where a *patni* sale was set aside under s. 14 of Regulation VIII of 1819, it was observed that an auction-purchaser is entitled to be indemnified, and he is not indemnified if he simply gets back his purchase-money without interest. It

was *held*, therefore, that he was entitled to get back the purchase-money with interest (*Bejoy Chand Mahtab* v. *Amrita Lall Mukherjee*, I. L. R., 27 Cal., 308). Similarly, where a *patni* sale was set aside on the ground that no notice, as required by the Regulation, had been served, and the Lower Appellate Court had refused to make an order for the refund of the purchase-money, the High Court, in special appeal and with reference to s. 14, cl. 1 of the Regulation, declared the purchaser entitled to a refund with interest (*Moberuk Ali* v. *Ameer Ali*, 21 W. R., 252). Again, where the sale of a *patni* for default was reversed on the ground of the notice not being served properly as required by the law, the purchaser was held to be entitled, under s. 14, to a refund of his purchase-money and to recover his costs from the zamindar (*Baikanta Nath Sing* v. *Maharaj Dheraj Mahtab Chand Bahadur*, 17 W. R., 447). Finally, where a zamindar sells a *patni* tenure for arrears of rent, and the sale is afterwards set aside, the purchaser can, under Regulation VIII of 1819, require the Court to compel the zamindar to indemnify him on account of all payments of rent, which he may have made; and if he does not do so, he cannot set up his loss in answer to a liability which he has incurred (*Taru Chand* v. *Nafar Ali*, 1 C. W. N., 36).

He is entitled to interest.

And to costs.

Purchaser entitled to be indemnified for payments of rent.

The remedy prescribed in this section is perhaps the only remedy to which an auction-purchaser is entitled. In *Radha Madhav Samanta* v. *Sasti Ram* (I. L. R., 26 Cal., 826), where a payment of rent had been made by an auction-purchaser after the decision of the first Court in a suit, brought by the defaulting *patnidar*, declaring the sale invalid, and during the pendency of the appeal preferred not by him, but by the zamindar, it was *held* that the remedy which the auction-purchaser had, after the reversal of the sale, to be reimbursed by the defendant under s. 69 of the Contract Act was not curtailed by the provisions of s. 14 of Regulation VIII of 1819. "This (*i.e.*, s. 14)," observed Bannerjee, J., "no doubt provides for the auction-purchaser, in the event of the reversal of the sale, being indemnified against all losses that may have been sustained by him, and the remedy is to be at the expense of the zamindar, at whose instance the sale was brought about. But it does not say that the remedy prescribed is to be the sole remedy to which the auction-purchaser is entitled, notwithstanding that, by virtue of any other provision of law, he may be entitled to a remedy against any other person than the zamindar. If then s. 69 applies to this case, and, as I have said above, it does apply to it, and the plaintiff is, in consequence, entitled to be re-imbursed by the defaulting *patnidars*, who were bound to pay the money, the provisions of s. 14, Regulation VIII, cannot, in my opinion, stand in the way of the plaintiff's obtaining such relief." This view has, however, been questioned in the case of *Nagendro Nath Pal Chowdhury* v. *Chandra Sekhar Dalal* (5 C. L. J., 59). In that case, a *patni* tenure was sold for arrears of rent and purchased by the plaintiff, and rents were paid by the plaintiff to the zamindars and accepted by them. The *patni* sale was afterwards set aside at the instance of the defaultng *patnidars*, on the ground of irregularities committed by the zamindars. It was *held* that the plaintiff was entitled to receive back the money paid by him as rent from the zamindars to whom he had paid it, and who were not entitled to retain it. The plaintiff, observed Rampini, J., when he made the payments, made them for himself and not for the defaulting *patnidars*, and he cannot be regarded as a person interested in the payment

Doubtful if purchaser can proceed against defaulting patnidar under s. 69 of the Contract Act.

of money for another within the meaning of s. 69 of the Contract Act, and it is doubtful if he is entitled to recover the amount from the defaulting *patnidars*. The view, which Woodroffe, J., took, was that the subsequent reversal of the *patni* sale must be taken to be that, when the payment was made, it was so made under a mistake, though the circumstances, which made the payment one by mistake, did not take place until afterwards.

Auction-purchaser need not bring a fresh suit for his dues.

The auction-purchaser need not bring a fresh suit to recover his dues. The decree of a Court, reversing the *patni* sale on the ground of non-service of due legal notice, should make allusion to the return of the purchase money, and also decide whether the purchaser is entitled to obtain further damages and costs (*Shaik Abdulla* v. *Umed Ali*, 6 W. R., 321). When it is decreed that the purchaser may recover the purchase-money from the zamindar, the purchaser may proceed to execution without a fresh suit (*Preolall Goswami* v. *Gyan Tarungini*, 13 W. R., 161). Notice that if the purchase-money is in deposit in the Collectorate and the zamindar fails to assist the purchaser in recovering his dues, he is liable for interest on the entire sum. "With reference," observed Kemp, J., in *Preolall Goswami* v. *Gyan Tarungini*, (13 W. R., 161), "to the second objection, namely, that, even admitting that the decree can be executed, the special appellant should only be held liable to pay interest on the 82 Rupees which eighty-two took out of Court from the surplus proceeds—we think that there is no ground whatever for this contention. The special appellant was bound to pay to the special respondent the sum of Rs. 725, the amount of the purchase-money. He ought either to have done so by a cash payment, or, if the money was in deposit at the Collectorate and available for the purpose of paying the purchaser, to have moved the Court to send for the money, or otherwise to have assisted the special respondent in recovering his just dues. It was not the business of the special respondent to have applied to apply to the Collector for that sum, and any application that he might have made would probably have been unsuccessful without an order of the Civil Court. The special appellant has only himself to thank for this accumulated amount of interest. This would not have taken place, had he paid the money under the decree or put the special respondent in the way of recovering the sum due by a timely application to the Civil Court to direct the Collector to place the surplus sale-proceeds at the disposal of the special respondent."

He may proceed to execution when decree is passed.

Zamindar liable to interest if he does not help purchaser in recovering his dues.

Patnidar liable to pay arrears.

Position of the patnidar when the sale is set aside.—When the sale of a *patni* is set aside and the *patnidar* is restored to possession, he is liable to pay the rent for the period during which he was out of possession. A *patni* was sold under Regulation VIII of 1819, the *patnidar* was ousted and the purchaser put into possession. The sale was subsequently set aside, and the zamindar brought a suit for the recovery of rent, on the *patnidar* being restored to possession. *Held* that, upon the setting aside of the sale and the restoration of the *patnidar* to possession, he took back the estate subject to the obligation to pay the rent, and the arrears claimed must be taken to have become due in the year in which the restoration to possession took place (*Rani Sornomoyi* v. *Shoshee Mukhee*, 12 M. I. A., 244; 2 B. L. R., P. C., 11; 11 W. R., P. C., 5). So also in *Dhanpat Singh* v. *Saraswati Misrain* (I. L. R., 19 Cal., 267), which was a suit by a zamindar against his *patnidar* for arrears of *patni* rent for the years 1294, 95 and 96, it appeared that the

patnidar had been out of possession during a portion of that period, and that the zamindar himself had been in possession, having purchased the tenure at a sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside, owing to the proceedings having been instituted against the predecessor of the *patnidar* who was then dead, and thereupon the zamindar gave notice to the *patnidar* to retake possession, which he accordingly did. During the time the zamindar was in possession, he himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrongdoer and trespasser, and that, consequently, the defendant could not be held liable for rent during that period. The High Court, however, *held* that there was no reason for refusing the plaintiff a decree for such arrears, as, upon the authority of the decision in *Rani Sornomoyi* v. *Shoshee Mukhee Burmonia* (12 Moo., I. A., 244; 2 B. L. R., P. C., 11; 11 W. R., P. C., 5), the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon. Where, however, there is a substantial interference by the landlord with the tenant's enjoyment of his tenure even though there is no complete eviction, and the interference is not *bonâ fide*, the tenant is entitled to a suspension of the rent for the period during which there was such interference. (*Mahomed Jeaullya Mea* v. *Sukheannessa Bibi*, 14 C. W. N., 446.) In this case, *J* auction-purchased a *darpatni* with power to annul incumbrances and served notice to quit on the *sepatnidars*, who refused to yield possession. On *J* attempting to take forcible possession, criminal proceedings ensued, as a result of which the *sepatni* was attached under s. 145 of the Criminal Procedure Code on the 3rd of October, 1902. The land attached was subsequently let out to an *ijaradar* who paid rent to the *patnidar* and deposited certain sums as *ijara* rent in the Collectorate. Some of these sums deposited were withdrawn by *J* as *darpatnidar*. In 1906, the *sepatnidars* obtained a decree establishing their *sepatni* title, and, in pursuance of that decree, withdrew some of the *ijara* rent that was deposited in the Collectorate. In a suit for rent by *J* against the *sepatnidars* for the period during which the property was under attachment, it was *held* that the circumstances constituted such substantial interference by the landlord with the tenant's enjoyment of the tenure as disentitled him to recover rent for that period, and that, on the facts of the case, it was not such *bonâ fide* interference without prejudice to the tenant as would entitle the landlord to receive rent. It was on the ground of *malâ fide* dispossession that this case was distinguished by the Judges from the case of *Rani Sornomoyi* v. *Shoshee Mukhee Burmonia* (12 Moo., I. A., 244; 2 B. L. R., P. C., 11; 11 W. R., P. C., 5). They said: "It has been contended on behalf of the plaintiffs (appellants) that, in attempting to take possession of the *sepatni*, they were acting in the *bonâ fide* belief that they had a right to do so, and that they were justified in so believing, as they had purchased the *darpatni* tenure at a sale in execution of a decree for rent due thereon, and the sale-certificate expressly empowered them to annul all incumbrances. In support of this contention reliance has been placed on the case of *Rani Sornomoyi* v. *Shoshee Mukhee*. In that case, the zamindar was held entitled to recover

But not when there is *malâ fide* interference with tenants' possession by zamindar.

from the *patnidar* rent for the period during which the latter was out of possession in consequence, no doubt, of the initial act of the zamindar in putting in force, through the medium of the Collector, the summary provisions of Regulation VIII of 1819, for recovery of arrears of rent; but the distinction between that case and the present one is that in that case the zamindar, when he applied to the Collector for sale under the Regulation, pursued the legal remedy provided in that behalf, though, in doing so, he inadvertantly omitted some of the formalities prescribed by it, whereas in this case the plaintiffs, on being resisted by the defendants, attempted forcibly to take possession instead of resorting to a Court of law for redress. The direct result of this unlawful act was that the defendants were thrown out of possession by the Magistrate. There is a further distinction, in that, in the Privy Council case, the *patnidar* recovered the whole of the profits of the *patni* for the period during which he was out of possession, whereas, in the case before us, the *patnidars* received a very small portion of the profits for the four years during which they had been kept out of possession."

Patnidar liable for rent for the period intervening sale and reversal.

When a sale of a *patni* is subsequently set aside, the zamindar is entitled to rent from the *patnidar* for the period intervening between the sale and its reversal. If the *patnidar* has been dispossessed by the auction-purchaser during this period, he will be entitled to mesne profits from the latter (*Amrita* v. *Bejoychand Mahtab*, 1 C. L. J., 77*n*). Where, however, a landlord without any justification refused to treat the purchaser as his tenant and deliberately omitted to implead him as a party in the suit for rent, the whole of which had accrued due after the transfer and was payable by the transferee, it is not open to the landlord to treat the purchaser as a tenant, and make him liable for the rent that accrued due between the date of the institution of the previous suit and the sale in execution of the decree made thereunder (*Govinda Sundar Sinha Chowdhury* v. *Srikrishan Chakravarti*, 10 C. L. J., 538).

But not if landlord refused to treat purchaser as tenant.

Mesne Profits.—When a sale is set aside, the *patnidar*, as we have already seen, is entitled to mesne profits. Where the sale of a *patni* under Regulation VIII of 1819 is set aside at the suit of *A*, one of the co-sharers, it is not necessary for *B*, another sharer, to sue for the reversal of the same sale; but *B*, or those who claim under him, are entitled to mesne profits for the time during which *B* was out of possession by the action of the sale in question (*Tarini Proshad Ghose* v. *Banee Madhub Pandey*, 2 W. R., 248). A zamindar granted a *patni* to *A* who granted a *darpatni* to *B*. The *patni* was sold for arrears of rent to *C*, who entered into possession, cancelled *B's darpatni*, and, after two years of possession, granted a *darpatni* to *D*. In the meanwhile *A*, the original *patnidar*, had the sale set aside in a regular suit brought for that purpose, and thereupon *B* brought a suit against *D* alone for mesne profits. *Held* that *D* was entitled to be credited with the amount of rent which he had paid to his *patnidar C* and with the expenses of collection (*Noffer Ali* v. *Rameshwar*, 3 C. L. R., 28). Where a *patnidar* (purchaser at an auction-sale) brought a suit to set aside the defendant's *darpatni* lease on the ground that it was collusive, and to obtain *khas* possession of the land, and where the lower Court, holding that the *darpatni* was valid, refused the plaintiff's prayer for *khas* possession, but awarded him mesne profits to the extent of the rent payable to him by the *darpatnidar*, it was *held* mesne profits could not be

decreed against a *darpatnidar* nor can rent be decreed in a suit for ejectment. "The appellant," it was said, "was found to be in *bond fide* possession as a *darpatnidar*. To demand mesne profits from him was to do away with this finding, and to treat him as a wrong-doer in illegal possession of land to which he had no title." (*Digbijoy Neogi* v. *Jadub Chander Thakur*, 8 W. R., 181). *A* was dispossessed by *B* who, six years after such dispossession, granted a *patni* lease to *C* on payment of a premium. *A* sued both *B* and *C* for mesne profits. *Held* that *C*, the *patnidar*, was liable to the extent of the profits taken by him from the land, and that whether he had anything to do with the ouster of *A* was immaterial (*Sristidhar Shah* v. *Maharaja Jagundindar Banwari Gobind*, 2 Sev., 310). Where a landlord (*patnidar*) and his tenant were defendants in a suit by the zamindar for setting aside the *patni*, and both were, by the decree, made liable for the mesne profits which the tenant eventually paid out of his own pocket, it was *held* that the effect was to cancel all relations of landlord and tenant between them, and give the tenant a right to receive back what he had paid (*Rakhal Moni Dossee* v. *Brojendro Gopal Roy & another*, 23 W. R., 303).

Cause of action the sale of the whole estate.

Form of Suit for the Reversal of the Sale.—The cause of action is the sale of the whole estate, and a suit to set aside the sale should be framed and valued accordingly. A *patni taluk* belonging to several co-sharers was sold for arrears of rent. One of the co-sharers brought a suit in the Munsiff's Court to set aside the sale, valuing the subject-matter according to his own share, and making his co-sharers defendants. It was *held* that the suit could not be maintained in this form, that the cause of action was the sale of the whole estate, and that the suit should have been framed and valued accordingly and brought in a Court in which the right of all the parties interested in setting aside the sale could have been declared in a single suit (*Annoda Prosad Rai* v. *Erskine*, 2 B. L. R., 370). The same view was taken in the case of *Suresh Chandra Mukhopadhya* v. *Akkori Sing* (I. L. R., 20 Cal., 746). In that case, certain *patnidars* having defaulted, their *patni* right was put up for sale by the zamindar under Regulation VIII of 1819, and purchased by the defendants. The plaintiffs being *sepatnidars* of a portion of the lands let out in *patni*, were, after the sale, dispossessed by the defendants. The *sepatnidars* brought a suit against the defendants, asking for the possession of the *mouzahs* forming their *sepatni*, alleging that the notification of sale had not been duly served, and that the proceedings taken by the zamindar were bad, as they were taken in the name of the last deceased holder of the *patni*. The zamindar was made a party to the suit, but no relief was asked for against him. *Held* that notwithstanding that the plaint questioned the validity of the sale, the suit was not one under s. 14 of the Regulation, no relief being claimed against the zamindar, and that the plaintiff's only remedy was a suit under s. 14 of the Regulation to set aside the sale of the entire *patni*: the true cause of action was the sale of the whole estate, and the plaintiffs should have framed and valued the suit accordingly, so that the rights of all the parties concerned could be adjusted in accordance with the spirit of s. 14 of the Regulation. It follows, therefore, that the sale of a *patni* cannot be declared good or bad in part, but the sale of the whole *taluk* must stand or fall (*Ram Charan Bandopadhya* v. *Dropo Moyi Dassi*, 17 W. R., 122).

Sale cannot be declared good or bad in part.

Validity of sale cannot be attacked collaterally.

Notice that the validity of a *patni* sale cannot be attacked collaterally in a suit for ejectment brought by the purchaser or his representative in interest (*Ram Sona Chowdhurani* v. *Sonamala Chowdhurani*, 13 C. L. J., 404; 3 C. C. L., 658). "The general rule," observed the Judges in this case, "is that a judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed or annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect to its validity, verity or binding effect, by parties or privies in any collateral action or proceeding. No doubt the position may be different when a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter; such a judgment may possibly be treated as a nullity and collaterally impeached by any person interested, wherever it is brought in question. But that doctrine has no application to a case like the present where the validity of the sale is plainly intended by the Legislature to be determined in a suit, properly constituted and brought in a Court of competent jurisdiction, within the time allowed by law, and against the parties sought to be affected by the result."

Onus lies on zamindar.

Onus.—In a suit to set aside a *patni* sale held under s. 14 of Regulation VIII of 1819, the onus is not upon the plaintiff to prove that the notices were not served, but it is the duty of the zamindar to establish that the provisions of the law have been complied with (*Prem Chand Chowdhury* v. *Saraj Ranjan Chowdhury*, 1 C. L. J., 102*n*). See also notes under the some heading in section 8 (*ante*).

Limitation of suits to set aside a sale.

Limitation.—The limitation of suits to set aside a sale under the Regulation begins to run from the date of the payment of the full purchase-money, the period being one year under Art. 12, cl. (*d*) of the second Schedule of the Limitation Act (XV of 1877). Where, however, one of several co-owners of a *patni taluk* has instituted a suit to set aside the whole of a *patni* sale making the purchaser a party, section 8 of the Limitation Act has no application, and the co-owner, if a minor, would be entitled to bring such a suit even though the adult co-owners have allowed their right to be time-barred (*Gangadhar Sarkar* v. *Khaja Abdul Ajij*, 14 C. W. N., 128). See also *Ram Sona Chaudhurani* v. *Sonamala Chowdhurani* (13 C. L. J., 404; 3 C. C. L., 658); *Bhuban* v. *Girish* (13 C. L. J., 339).

Limitation for arrears of rent when sale is set aside.

If the sale is set aside, the zamindar is entitled to bring a suit for the arrears under the ordinary Rent Law, as if no application had been made. Limitation as to the arrears of rent does not run during the pendency of the suit for setting aside the sale.

Limitation where litigation is going on.

When the result of the litigation between any persons is such that they are found in the relation of landlord and tenant to each other, and to have stood in this relation when such litigation was pending, but, until their mutual rights were finally determined by such litigation, such landlord was unable to sue such tenant for rent, the period of limitation for suing for any such rent shall be computed from the termination of such litigation. In the case of *Sornomoyi* v. *Shoshee Mukhee Barmani* (12 Moo. I. A., 246; 11 W. R., P. C., 5; 2 B. L. R., P. C., 10) a zamindar brought a *patni* tenure to sale under Regulation VIII of 1819. The *patnidar* was, thereupon, ousted, and the purchaser took possession of the *patni* tenure. The *patnidar* then successfully sued to have the sale reversed on the ground of irregularity, and

recovered possession of the *patni* tenure, together with mesne profits, from the purchaser for the period of his possession. The zamindar subsequently sued the *patnidar* for rent for this period. Such rent was barred, if the period of limitation contained in Act X of 1859 were to be applied without qualification. The Privy Council, however, *held*, that it was not barred; that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this rent revived; that the *patnidar*, on being restored to possession, took back the estate subject to the obligation to pay the rent; and that the particular arrear must be taken to have become due in the year in which that restoration to possession took place. See also *Ishan Chandra Rai* v. *Ashanullah* (8 B. L. R., 537 note; 16 W. R., 79); *Din Dayal Paramanick* v. *Radha Kishori Debi* (8 B. L. R., 536; 17 W. R., 415); *Mohesh Chandra Chakladar* v. *Gangamani Dasi* (18 W. R., 59), and *Dhanpat Sing* v. *Saraswati Misrain* (I. L. R., 19 Cal., 267). This rule is, however, not applicable where, although the landlord has denied the continuance of the relation of landlord and tenant, and attempted to put an end to that relation, the tenant was, nevertheless, not dispossessed, and there was, in consequence, nothing to prevent the landlord from suing for and recovering his rent. See *Watson & Co.* v. *Dhanendro Chandra Mukherji*, I. L. R., 3 Cal., 6; *Brojendro Kumar Rai* v. *Rakhal Chandra Rai*, *Ib.*, 791; *Haro Prosad Rai* v. *Gopal Das Datta*, Ib., 817; *Horonath Rai* v. *Golok Nath*, 19 W. R., 18; *Barada Kanta Rai* v. *Chandra Kanta Rai*, 23 W. R., 280; *Haro Prosad Rai* v. *Gopal Das Datta*, I. L. R., 9 Cal., 255; 12 C. L. R., 129; *Sheriff* v. *Dina Nath Mukherjee*, I. L. R., 12 Cal., 258; *Horo Kumar Ghosh* v. *Kali Krishna Thakur*, I. L. R., 17 Cal., 251; *Barnamoyi Dassi* v. *Brammamoyi Chowdhurani*, I. L. R., 23 Cal., 191; *Mahomed Mazid* v. *Mahomed Ashan*, I. L. R., 23 Cal., 205. Where a suit for the recovery of arrears of rent was brought more than 3 years after the due date, it was *held* that the fact that a suit for enhancement had been brought by the plaintiff within that period, and that in that suit the plaintiff had claimed enhanced rent for the year in question, stayed the operation of the law of limitation (*Hem Chandra Chaudhurani* v. *Kali Prosunno Bhaduri*, 8 C. W. N., 1).

Where one of the two co-sharers of a *patni* fraudulently fails to pay his share of the rent and permits the *patni* to be sold by the zamindar for arrears, the other co-owner's cause of action against him accrues at the date of the sale when the fraud is consummated (*Bhagwan Chandra Roy* v. *Raj Chunder Roy*, 9 W. R., 553). *D* purchased a *darpatni benami* in the name of *S*, who, colluding with the *patnidar*, suffered judgment as for rent in arrear, and, the *darpatni* being thereupon sold, was purchased by the *patnidar*. *Held* that a suit by *D* to recover possession, brought more than 3 years after *D* became aware of the fraud practised upon him, was not barred by limitation, Art. 95 of the Limitation Act not being applicable to the suit. The onus was on the defendants, who relied on Art. 95 as a bar to the suit, to show that the plaintiff could not succeed without setting aside the decree. Nothing that happened between *S* and the *patnidar* could affect *D*'s title as the true owner of the land, unless *D* was estopped from denying the authority of his *benamidar* to deal with it, and on the facts of the case no such estoppel could exist. The plaintiff's title not being affected by the sale, it was not necessary for him to have the sale set aside (*Annada*

Limitation when fraud is alleged.

Pershad Panja v. *Prosonnomoyi Dassi*, 11 C. W. N., 817; I. L. R., 34 Cal., 711).

Limitation in a suit to recover co-sharer's share.

A suit was brought against an elder brother for the possession of the younger brother's share of a *patni taluk* purchased by the plaintiff at a sale held by the Sheriff in execution of a decree, which property the plaintiff alleged was joint, although purchased in the name of the elder brother. The defendant pleaded that for 12 years before the date of the plaintiff's purchase, neither the plaintiff nor his vendor was ever in possession, either by receipt of rent or otherwise, of any portion of the *patni taluk*. *Held* that evidence on this point should be required from both parties, and that, if the defendant's allegation be substantiated, the plaintiff was barred by limitation (*Harihar Mukherjee* v. *Tincowrie Dassi*, (6 W. R., 170).

Delivery of possession to purchaser.

15. *First.*—So soon as the entire amount of the purchase-money shall have been paid in by the purchaser at any sale made under this Regulation, such purchaser shall receive from the officers conducting the sale a certificate of such payment.

The purchaser shall then proceed with the certificate in question to procure a transfer to his name in the *cutcherry* of the zamindar, and, upon furnishing security, if required, to the extent of half the *jama* or annual rent, he shall receive the usual *amaldastak*, or order for possession, together with the notice to the raiyats and others to attend and pay their rent henceforward to him.

The zamindar shall also be bound to furnish access to any papers, connected with the tenure purchased, that may be forthcoming in his *cutcherry*, and should he in any manner delay the transfer in his office, or refuse to give the orders for possession, notwithstanding that good and substantial security shall have been furnished or tendered on requisition, the new purchaser shall be entitled to apply direct to the Collector; and he shall receive the orders for possession, and shall be put in possession, of the lands by means of the *nazir*, in the same manner as possession is obtained under a decree of Court: provided, however, that if the delay be on account of the zamindar's contesting the sufficiency of the security tendered, the rule contained in section 6 of the Regulation shall be observed.

Procedure in case of opposition to purchaser.

Second.—When the new purchaser shall proceed to take possession of the lands of his purchase, if the late incumbent himself, or the holders of tenures or assignments derived from the late incumbent, and intermediate between him and the actual cultivators, shall attempt to offer opposition, or to interfere with the collections of the new purchaser, from the lands composing his purchase, the latter shall be at liberty to apply immediately to the

Collector for the aid of the public officers in obtaining possession of his just rights.

A proclamation shall then issue under the seal and signature of the Collector declaring that the new incumbent having, by purchase at a sale for arrears of rent due to the zamindar, acquired the entire rights and privileges attaching to the tenure of the late *talukdar*, in the state in which it was originally derived by him from the zamindar, he alone will be recognized as entitled to make the zamindari collections in the mofussil, and no payments made to any other individual will, on any account, be credited to the raiyats or others in any suit for rent or on any other occasion whatever when the same may be pleaded.

Procedure in case of continued opposition.

Third.—Should the late incumbent or his late under-tenants continue to oppose the entry of the new purchaser, notwithstanding the issuing of such a proclamation, or should there be reason to apprehend a breach of the peace on the part of any one, the aid of the police-officers and of all other public officers who may be at hand and capable of affording assistance shall be given to the new purchaser, on his presenting a written application for the same; and in the event of any affray or breach of the peace occurring, the entire responsibility shall rest with the party opposing the lawful attempt of the purchaser to assume his rights.

Notes.

Extension of the Act.

Extension of the Act.—For extension of s. 15 to other sales for rent, see Bengal Regulation I of 1820, s. 2(3) *post*.

Confirmation unnecessary.

Sale when final.—A sale under the *Patni* Regulation does not require to be confirmed. It becomes final and conclusive when the whole of the purchase-money has been paid under s. 9 of the Regulation (*Ramsona Chowdhurani* v. *Sonamala Chowdhurani*, 13 C. L. J., 404; 3 C. C. L., 658).

Certificate need not be registered.

Certificate.—A certificate of payment, granted under the provisions of cl. 1, s. 15 of Regulation VIII of 1819, is admissible in evidence without being registered. Jackson J., who delivered the judgment, remarked:—"It is a certificate granted for a particular purpose, *viz.*, to entitle the holder of it to register himself. It is not a certificate of sale, but a certificate after the sale is made, showing that the purchase-money has been paid. It is in fact a receipt showing payment of the purchase-money, the sale being an act of the Collector under the Regulation in consequence of an arrear having taken place. We think there is no authority for holding that such a certificate, or that any paper purporting to be evidence of a sale under the Regulation, equires to be registered." (*Abdool Aziz Biswas* v. *Radha Kanta Kabiraj*, I. L. R., 5 Cal., 226).

Registration.—The purchaser of a *patni taluk*, sold for arrears of rent, was refused registration as he had not tendered the full amount of security

When registration is refused, purchaser must go to Civil Court.

required by the zemindar. The Collector, therefore, withdrew his previous order for delivery of possession, until sufficient security was given. His appeal to the Commissioner was rejected as the Commissioner had no jurisdiction in the matter. The Board held that s. 11 of Act VIII (B. C.) of 1865 refers to sales of under-tenures held in satisfaction of decrees for arrears of rent, but, when a *patni* tenure has been summarily sold under Regulation VIII of 1819, and the security tendered by the purchaser is rejected by the zemindar, the purchaser's remedy is by application to the Civil Court under s. 6 of this Regulation, and that the delivery of possession is regulated by the first clause of this section—(Board's Miscellaneous Proceedings of 12th January, 1899, No. 15, Collection 8, File 428 of 1888).

Payment of rent by auction-purchaser.

Liability of auction-purchaser for rent.—Where a tenure is sold in execution of a decree, the auction-purchaser is liable for the whole instalment of rent accruing due after his purchase, but before the confirmation of the sale; rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or, in the absence of any contract, according to the general law laid down in s.. 53 of Bengal Tenancy Act (*Satyendra Nath* v. *Nilkantha*, I. L. R., 21 Cal., 383), but where a tenure is sold in execution of a decree for arrears of rent, which fell due before sale, the auction-purchaser is not liable. *Ibid.* The purchaser becomes a tenant only from the date of the confirmation of the sale, and the arrears accruing due between the date of the sale and the date of the confirmation of the sale, must be treated as arrears of rent payable by outgoing tenant whose interest does not cease till the sale is confirmed. (*Karunamoy* v. *Surendra Nath*, 2 C. W. N., ccexxvii, 327). Rent is by operation of law the first charge on a tenure, and a person, who purchases the same at an execution-sale, must, in the absence of anything to denote the contrary, be taken to purchase it, charged with the rent which is due in respect of it at the time of its purchase. (*Srimati Moharanee* v. *Harendra Lall*, 1 C. W. N., 458). But a purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent. (*Sreemutty Jogemaya* v. *Girendra Nath*, 4 C. W. N., 590). See also *Rash Behary* v. *Peary Mohun* (I. L. R., 4 Cal., 346). Arrears that have accrued subsequent to the application under the Regulation are a charge on the *taluk*, and the purchaser is bound to pay them. Nor is the defaulter liable for the rent of the month in which the zamindar presented the petition enjoined by cl. 3, s. 8, Regulation VIII of 1819 (*Darinta Debya* v. *Nilmoni Sing Deo*, 15 W. R., 180). Such arrears may be realized by the summary process.

Late Talukdar.

Late Talukdar.—The words "*late talukdar*" in cl. 2 must be given a wider application to include his predecessors being representatives or assignees of the original *patnidar* (*Gopendra Chandra Mitter* v. *Mokaddam Hossain*, I. L. R., 21 Cal., 702).

16. [*Repealed by section 2, Act VIII (B. C.), of 1865*].

Disposal of proceeds of sale.

17. *First.*—The following rules have been enacted for the disposal of the proceeds of any sale made under the rules of this Regulation :—

Notes.

For extension of this section to other sales for rent, see Bengal Regulation I of 1820, s. 2(3) *post*. See also s. 73 of Transfer of Property Act (IV of 1882).

Second.—One per cent. shall first be deducted from the nett proceeds realized, and shall be carried to the account of Government, for the purpose of meeting the expense of any extra establishments, which it may be necessary to maintain, for carrying into effect the provisions of this Regulation.

One per cent. to be carried to the account of Government.

Notes.

Corresponding provision in the Tenancy Act.—Section 169 of the Bengal Tenancy Act lays down the rules for the disposal of the proceeds of a sale, and provides that "there shall *first* be paid to the decree-holder the costs incurred by him in bringing the tenure or holding to sale."

Tenancy Act.

Third.—The balance on account of which the sale may have been made shall next be made good in full (with interest and all charges incurred in bringing the *taluk* to sale) to the zamindar or other person to whom the same may be due:

Payment to zamindars

Provided, however, that no former balances, beyond those of the current year (or of that immediately expired, if the sale be at the commencement of the following year), shall be included in the demand to be thus satisfied. Such antecedent balances, if the zamindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual *talukdar*, and must be recovered in the same way as other debts by a regular suit in the Court.

Zamindar's balance and expenses to be next made good.

Notes.

Corresponding provisions in the Tenancy Act.—Section 169 (1) (*b*) of the Bengal Tenancy Act provides:—"There shall, in the next place, be paid to the decree-holder the amount due to him under the decree in execution of which the sale was made;" and section 169 (1) (*c*) of the same Act provides:—"If there remains a balance after these sums have been paid, there shall be paid to the decree-holder therefrom any rent which may have fallen due to him in respect of the tenure or holding between the institution of the suit and the date of the sale."

Tenancy Act.

Payment to the Zamindar.—The balance on account of which the sale is held should be made good to the zamindar with interest and charges. Mukhtears' and Revenue Agents' fees may be treated as charges incurred in bringing the *taluk* to sale (Board's Miscellaneous Proceedings of 12th September, 1874, No. 283). Under cl. 3, a zamindar can demand all reasonable charges in bringing the *patni* to sale, and, if the Collector considers the employment

Mukhtears' and Revenue Agents' fees, charges. Boards' Proceedings. Pleaders' fees may also be charges.

of a pleader reasonable, the charge would be legitimate. The Collector will have to decide whether the engagement of a pleader, instead of a Mukhtear or a Revenue Agent, was necessary or reasonable. Such charges should only be allowed, if they are actually incurred (Board's Sale Proceedings of 2nd August, 1902, No. 2, Collection 1, File 41 of 1902).

Rent as used in s. 169, B. T. Act, includes interest.

Notice that rent, as used in cl. (c), s. 169 of the Bengal Tenancy Act does not exclude interest. (*Maharajadhiraj Bejoy Chand Mohtab* v. *S. C. Mukerjee*, 11 C. W. N., 1106). Consequently, where a landlord applied under that section for getting the rent and interest, due to him between the date of the institution of the suit and the date of the sale, from the surplus sale-proceeds and the judgment-debtor raised no objection to it, but admitted the justice of the decree-holder's demand, it was *held* that the decree-holder was entitled to get interest on rent (*Ibid*).

The balance should be made over to the zamindar in cash. A *patni taluk* was sold for arrears of rent. After the full amount of the purchase-money had been deposited by the auction-purchaser and the sale confirmed by the Collector, the zamindar presented a petition asking that one per cent., which the Government was entitled to have under this section, might be taken, and the residue applied to the satisfaction of the revenue demand payable for an estate owned by him. The Board, on the advice of the Legal Remembrancer, *held* that the provision of this section should be strictly followed, and that, after the one per cent. had been carried under cl. 1 to the account of Government, the zamindar's balance should be made over to him. The two transactions, *viz.*, (1) the payment to the zamindar of the balance of the sale-proceeds of the *patni* tenure, and (2) the payment by the zamindar of the Government revenue demand, should be kept entirely distinct, so that, in the event o the *patni* sale being set aside, the auction-purchaser's remedy would be against the zamindar and not against Government (Board's Miscellaneous Proceedings of 8th January, 1889, No. 181, Collection 7, File 184 of 1889)

Zamindar must be paid in cash.

Boards' Proceedings.

Antecedent balances.—Antecedent balances are mere personal debts which cannot be summarily recovered under the procedure prescribed by the *patni* Regulation. It was held, however, in *Peary Mohun Mukopadhya* v. *Sreeram Chandra Bose* (6 C. W. N., 749), that they may also be a charge on the *taluk* and that the *taluk* may be sold subject to them, so that where the purchaser of a *patni taluk* paid off a decree for rent obtained against the old tenant for a period, anterior to that of the rent decree in execution of which the *taluk* was sold, he paid off a debt attaching to the *taluk* he had purchased, and, in consequence, under the ruling laid down in *Maharani Dasya* v. *Horendro Lall Roy* (1 C. W. N., 458), he could not recover any portion of the amount by means of a contribution suit from the old tenant against whom the rent-decree had been obtained. There is, it was observed, no difference between *patni taluks* and other tenures in respect of the applicability of s. 65 of the Bengal Tenancy Act to them, and hence the purchaser had no more right to contribution than he would have had, if the tenure had not been a *patni taluk*. This view has, however, been expressly dissented from in the case of *Jagannath* v. *Mohiuddin Mirza* (I. L. R., 37 Cal., 747), where the Judges said:—"We regret we are unable to agree with the learned Judges, who decided that case (*Peary Mohon* v. *Sreeram Chandra*), in holding that there is no conflict between s. 65 of the Bengal Tenancy Act and s. 17, cl. (3) of Regu-

Antecedent balances personal debts.

They are not a charge on the taluk sold.

lation VIII of 1819. In our opinion, in a case, where the arrears of rent claimed are for balances due, as explained in s. 17 of the *Patni* Regulation, for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year, or prior to the year preceding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the tenancy law, and that, in such a case, the provisions of s. 65 of the Bengal Tenancy Act would not have any application." Notice that under s. 12 of Act VIII of 1865, a plaintiff, who has obtained a decree for rent, has no charge over the surplus sale-proceeds for the rent of subsequent period (*Sukha Khan* v. *Radha Krishna Sing*, 4 C. L. J., 520).

No charge on surplus sale-proceeds for rent of subsequent period.

Fourth.—Any excess that may remain after satisfying the demand of the zamindar, in the manner above described, shall be forthwith sent by the officer conducting the sale to the treasury of the Collector or Assistant Collector of the district, to be there held in deposit to answer the claims of the *talukdars* of the second degree, or of others who, by assignment of the defaulter, may be at the time in possession of a valuable interest in the land composing the *taluk* sold, or on any part of it.

Disposal of remainder.

Notes.

Surplus Sale Proceeds: Property of Defaulter.—The surplus sale proceeds in the hands of the Collector, though under attachment by a Civil Court, continue to be the property of the *patnidar* until ordered to be paid away by an order from such Court (*Sæfoollah Khan* v. *Luchmeeput Sing*, 13 W. R., 58).

Surplus sale-proceeds: property of defaulter.

Distribution of Sale-Proceeds when attached.—A reference was made by the Collector as to the disposal of surplus sale-proceeds of a *patni* as he had received precepts to attach various amounts out of such proceeds deposited in the Treasury. The Board agreed with the Commissioner that the deposit should be retained for two months to allow claims to it to be substantiated under clause 4 of this section. At the end of that period, any balances left should be applied in satisfaction of decrees in full, in the order in which the Collector received the instructions of the various Courts (Board's Miscellaneous Proceedings of July, 1867, No. 605).

Distribution of sale proceeds. Boards' Proceedings.

A Zamindar has no prior right to surplus sale-proceeds.—A *patnidar* caused to be sold the tenure of his *darpatnidar*, under s. 59 of Bengal Act VIII of 1869, for the arrears of rent due up to *Choitra* 1282 (April, 1876). The sale took place on the 7th November, 1876, and, after satisfaction of the decree, the surplus proceeds remained in the Collectorate to the credit of the *darpatnidar*. Afterwards, in December, 1876, the *patnidar* brought another suit for the *darpatni* rent due in respect of the period between April and October, 1876 (*Bysakh* to *Ashin*, 1283) and, having obtained a decree, attached the surplus proceeds in the Collectorate, which were at the same time attached by two other holders of ordinary decrees. A rateable distribution of the sum in deposit was made by the Court between the three attaching creditors,

A zamindar has no prior right.

and under the distribution the plaintiff obtained Rs. 556-9-6 as his share. He then brought a suit to recover from the other attaching creditors Rs. 372-12-6, being the difference between the amount of his decree and what was assigned to him by the rateable distribution. *Held* that the decree of the *patnidar*, although for rents of the current year, had no priority over the other decrees; and that the surplus proceeds of the sale of the *darpatni* tenure formed part of the assets of the late *darpatnidar*, and were not hypothecated to the *patnidar* for the rent of the current year. (*Girish Chunder Mandal* v. *Durga Dass*, I. L. R., 5 Cal., 494). "It seems to us," observed the Judges in this case, "that the Subordinate Judge is quite wrong in saying that the tenure was hypothecated for rent due thereon, and also in saying that upon the sale-proceeds the same lien exists as upon the tenure itself. After the tenure had been sold for the arrears accruing up to 1282 (1875), the plaintiff could have had no further lien upon it for arrears accruing subsequently. Such arrears must be regarded as a personal debt against the defaulter, to be realized from him by the usual process for the execution of decrees. The surplus sale-proceeds stand to the credit of the defaulter, and, like any other assets of his, are liable to be attached in execution of outstanding decrees, and to be divided rateably amongst the judgment-creditors, who have taken out execution of decrees against the same defendant and not obtained satisfaction thereof. The plaintiff's claim to priority over other judgment-creditors by reason of his holding a decree for arrears of rent against the person in whose name the surplus proceeds are held in deposit, is not recognised by law; he stands in no better position than others who may hold personal decrees against the judgment-debtor."

Sepatnidar not entitled to share in sale-proceeds.

Right of a sepatnidar to sale-proceeds.—Where a *patni* was sold under Regulation VIII for default in the payment of rent made by a *patnidar*, it was held that a *sepatnidar* is not entitled to a share of the proceeds of the sale. The words "others who, by assignment of the defaulter, may be at the time in possession of a valuable interest in the land composing the *taluk* sold, or any part of it" in s. 17, cl. 4, do not include a *talukdar* of the 3rd degree, *i.e.*, a *sepatnidar*, because he is not an assignee of the defaulter, the defaulter being the *patnidar*. (*Moti Lall Ghose* v. *Bisheshwar Hazra*, 3 C. W. N., 60.)

Mortgagee entitled to be paid from surplus sale-proceeds.

Rights of a Mortgagee to Surplus Sale-proceeds.—The rights of a mortgagee are not dealt with in the Regulation; but the surplus sale-proceeds should be considered to represent the morgaged property, and a mortgagee is entitled to be paid therefrom in the first instance. A *patni taluk* having been sold for arrears of rent under Regulation VIII of 1819, the surplus sale-proceeds, held in deposit in the Collectorate, were drawn out at intervals by the holders of *money* decrees against the *patnidars*. The plaintiff, who held a mortgage of the *taluk*, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of these decree holders pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable. *Held* that the surplus sale-proceeds were to be regadred as the shape into which the mortgage security had been converted, and that, as before such conversion, the security could not be split

up into parts, the plaintiff was entitled to realize the balance due to him out of the whole of the surplus. (*Gosto Behari Pyne* v. *Shib Nath Dutt*, I. L. R., 20 Cal., 241.) "To hold that unsecured creditors, taking portions of the sale-proceeds, are exempt from liability to the mortgagee so long as they leave enough in the hands of the Collector would," observed the Judges in this case, "evidently have the effect of diminishing the mortgagee's security. For, the persons, who may take out money from the amount in deposit, subsequently may not be sufficiently solvent, and the mortgagee may not be able to realize his money from them with the same facility that he might have in his realization, if he got a decree against all the persons who took any portion of the money. The proper view to take of the matter is to regard the surplus sale-proceeds as the shape into which the mortgage-security is converted, and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect." So also, in the case of a sale under the Bengal Tenancy Act, where a mortgaged property was sold under a decree in a rent-suit, it was *held* that the mortgagee would have, under the provisions of s. 73 of the Transfer of Property Act, a charge on the surplus sale-proceeds whether, under the decree in the rent-suit, the property was put up for sale with power to the purchaser to avoid incumbrances or not, and that sections 159 and 161 to 167 of that Act (Bengal Tenancy Act) could not prejudice the rights of a mortgagee in that respect. (*Govind Sahai* v. *Sibdut Ram*, I. L. R., 33 Cal., 878). Notice that under s. 169(*c*) of the same Act the landlord is entitled to be paid, out of the sale-proceeds in Court, the amount of rent due in respect of the tenure between the institution of the suit and the date of the sale in priority to the mortgagee (*Probhat Chandra Mukherjee* v. *Jadupati Chakravarti*, I. L. R., 34 Cal., 724; 6 C. L. J., 26). Observe also that in case of a contest between the mortgagee and the *darpatnidar*, a question of priority may arise. This will probably be decided according to the law as laid down in the Transfer of Property Act and the principle of equity and good conscience, which the Legislature in the country directs to be applied wherever the positive law is silent. If, however, the creditor takes out his share of the money while a suit for setting aside the sale is pending, and the sale is subsequently set aside, he is bound to refund the money. In *Behari Lall Seal & others* v. *Maharajadhiraj Bejoy Chand Mahtab* (10 C. W. N., 234*n*), a *patni* was sold for arrears of rent under Regulation VIII of 1819 and was purchased by one Peary Mohon for Rs. 15,000 on the 18th May, 1900. The surplus sale-proceeds amounted to Rs. 13,615, and out of this sum the defendants, who were the creditors of the defaulting *patnidar*, withdrew the amount of their debt. Meanwhile, that is, on the 5th June, 1900, the defaulting *patnidar* brought a suit to set aside the sale, and the sale was set aside on the 14th August, 1900. The zamindar was obliged to refund to the purchaser Rs. 15,000, and he sued to recover from the defendants the amounts they had taken out. *Held* that the zamindar had a cause of action against the defendants. "The defendants," it was said, "took out a portion of the surplus sale-proceeds at a time when there was a suit pending, in which the question of the validity of the sale was involved. They, therefore, took out the money subject to the result of that suit, and, when the sale

Priority.

But creditor bound to refund if sale is set aside.

was set aside, there was an implied obligation on their part to return the money to the Court."

Under-tenants free to prosecute for price of their interest or compensation.

Fifth.—It shall be competent to any one conceiving himself to possess such an interest to bring forward his claim to the price he may have paid for the same, or for a just compensation for the loss sustained by him in consequence of the sale, by instituting a regular suit at any time within two months from the date of sale.

If the Court shall, on investigation, consider the plaintiff's claim to be an equitable one, the Court will award to the claimant either the price he may have originally paid, or the value of the interest at the time of sale, or any other amount that may be deemed just and equitable under all the circumstances.

If there be more claimants than one, payment shall not be made from the deposit, until the whole of the claims be settled; and in case the value assessed upon the whole should exceed the amount in deposit, such amount shall be divided proportionately, and the remainder stand as a personal debt against the defaulter, to be realised from him by the usual process for the execution of decrees.

Notes.

Regular suit must be brought.

Regular suit must be instituted to enforce claim.—If a subordinate tenure-holder has paid the rent due by him to the *patnidar*, he is entitled to bring a suit for compensation against the *patnidar* for his loss, and a decree may be passed in his favour directing the compensation to be paid out of the surplus sale-proceeds. It should be noticed that the claim can only be made by a regular suit. The *patnidar* of a *taluk* granted a *darpatni* to the defendant on the 10th of February, 1869. The same *patnidar* afterwards mortgaged the *patni taluk* to the plaintiff, who obtained a decree on his mortgage on the 25th September, 1874. The *patnidar* having then made default in payment of his rent, the *taluk* was put up and sold by auction for its own arrears on the 17th November, 1876; and, after payment of rent and all expenses, there remained a surplus in the hands of the Collector, which was attached by the plaintiff in execution of his decree on the 9th November, 1876. On the 12th of January, 1877, the defendant instituted a suit against the *patnidar*, under cl. 5, s. 17, Regulation VIII of 1819, for compensation for the loss of the *darpatni*, and obtained a decree, which the Court directed should be satisfied out of the surplus sale-proceeds. The amount of decree having been paid as directed, notwithstanding the plaintiff's attachment, the plaintiff filed a suit to recover the amount so paid on the ground that, as his attachment was prior to the suit of the *darpatnidar*, he was entitled to the whole of the sale-proceeds. *Held* that, as a claim to the surplus sale-proceeds could only be put forward by a regular suit under cl. 5, s. 17, Regulation VIII of 1819, the attachment of the plaintiff was not sufficient, and that the defendant's decree must be satisfied out of the sale-proceeds in priority to the

plaintiff's decree. (*Sornomoyi Dassya* v. *The Land Mortgage Bank of India, Ld.*, I. L. R., 7 Cal., 173). "It has been suggested to us," observed Garth, C. J., in this case, "that although the plaintiff did not bring any suit under cl. 5, s. 17, yet he must be considered as having made a claim to the surplus proceeds by placing an attachment upon them. But that is a course, which appears to us not to be warranted by cl. 5. The only claim which can be made under cl. 5, is by a regular suit, and the decree which is to be made in that suit is of a special nature, enforceable only as against the sale-proceeds; and if the plaintiff in his suit had intended to proceed against those proceeds under cl. 5, he could only have done so by instituting a regular suit."

One suit must be brought for the whole claim.

Form of suit for Compensation.—The whole claim should be included in one suit. A *patni* having been sold for arrears of rent, one of the co-sharers brought a suit and eventually obtained a decree setting aside the sale. In consequence, however, of the purchaser having defaulted in the payment of rent, the *patni* had again been sold, and the decree could not be executed by recovery of possession. Upon this, the decree-holder sued the purchaser at the first sale and others for surplus proceeds of the second sale, and recovered a portion. He then sued for and recovered mesne profits. Subsequently, he brought a third suit for compensation. *Held* that the whole claim which accrued under the first sale should have been included in one suit, and that, as the compensation was omitted from the first suit on the same cause of action, the plaintiff could not be allowed to claim it in a separate suit. (*Tarini Prosad Ghose* v. *Raghub Chunder Bannerjee*, 13 W. R., 203). Similarly a *patni taluk* was sold for arrears of rent and purchased by one *T P*. The *ex-patnidars* brought a suit and succeeded in getting the sale reversed; but in the meantime *T P* had himself defaulted in the payment of rent and a re-sale had taken place, and certain surplus proceeds remained in the Collectorate to the credit of *T P*. In this state of things the right, title, and interest of the *ex-patnidars* in the decree, by which the sale was reversed, were purchased by one *K*, who brought a suit for *wassilat*, and obtained a decree which was compromised with *T P*. After this, *K* brought a separate suit against *T P* on account of the surplus sale-proceeds, and obtained a decree for the greater part of the amount claimed. *K* then brought a third suit against *T P* for compensation on account of the deduction made from the above-mentioned sale-proceeds to meet rents which the defendant had neglected to pay to the zamindar, with interest, cost, etc. *Held* that the suit was barred by s. 7 of the Civil Procedure Code, the money claimed being a portion of the amount which she was bound to have asked for in her first suit as claimable under the original purchase. (*Tarini Prosad Ghose* v. *Khoodoomoyee Debya*, 13 W. R., 261).

Limitation.—Any suit under the Regulation by the *darpatnidar*, claiming a part of the surplus sale-proceeds, must be brought within two months from the date of the sale. This rule, however, does not apply where there is a special contract between the *patnidar* and the *darpatnidar*. (*Jadoo* v. *Nobo*, 3 W. R., 2.) A suit to recover the surplus sale-proceeds of a sale held under Regulation VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29, Schedule II of the Limitation Act. (*Lakhi Prya Chowdhurani* v. *Rama Kanta Shaha*, I. L. R., 30 Cal., 440).

Suit not to lie if under-tenant be himself in arrear at time of sale.

Sixth.—Provided, however, that no *talukdar* of the second degree or other possessor of an assigned interest upon the land of the tenure sold, who may be holding under a stipulation for the payment of an annual amount in the way of rent, shall be entitled to recover compensation for the loss of such tenure or assignment upon its becoming cancelled by sale of the superior *taluk*, except after exhibiting proof that the whole amount of the rent demandable from himself has been paid or lodged for the purpose prior to the date of sale.

Notes.

Under-tenant not entitled to compensation if in arrears.—If any part of the amount due by the *darpatnidar* as rent remains unpaid, he is not entitled to bring a suit for damages, and has no claim to compensation, the principle being that negligence on the part of a *darpatnidar* in not fully paying the amount due by him may have contributed to the non-payment by the *patnidar* of the amount due to the zamindar. Thus, it was *held* in *Madhabanand* v. *Joy Kumari* (3 W. R., 201) that a *darpatnidar* is entitled to damages, only if the *patni taluk* is put up to sale by the zamindar, owing to the sole neglect or default of the *patnidar* in not paying his rent, but not where the forfeiture is incurred by reason of failure of the *darpatnidar* to perform his contract and pay his own rent. The rule applies in spite of a contract to the contrary. In *Ishan Chundra Rai Pandah* v. *Tarini Prosad Ghose* (2 Sevestre's Report, 84), this provision was applied, although there was a stipulation in the contract creating the *darpatni* tenure, that the *darpatnidar* would be entitled to damages if the *patnidar* allowed the *patni* tenure to be sold or cancelled, it being decided that this stipulation must be held to be applicable, only if the *patni* were sold owing to the sole neglect or default of the *patnidar* in not paying his rent, and could not be equitably applied where the sale resulted from the *darpatnidar* failing to perform his contract and pay his own rent. A substantial compliance with the requirements of the section is, however, sufficient. A suit for the recovery of damages on account of the loss of the plaintiff's *darpatni* tenure *R*, forming part of the *patni* lot *K* which was sold under Regulation VIII of 1819 for arrears of rent, was brought against *S* as the ostensible owner, the real owner having been alleged to be her late father, whose widow and son were accordingly made defendants. It was alleged that the *darpatni* rents had been paid to the end of *Ashin*, and that the rent for *Kartik* had been offered, but refused. The first Court found these allegations to be true, decided that *S* was the real owner, and decreed the suit. It was contended in appeal that the receipt put in as proof of the alleged payment bore the seal of the widow *K*, and not of the daughter *S*. The Lower Appellate Court found sufficient proof of the payment irrespective of the receipt, and confirmed the first Court's decree. ***Held***, as to the real question in the suit, *viz.*, whether or not the plaintiff had complied with the conditions of the proviso in cl. 6, s. 17, that, although the plaintiff had not complied with the proviso in Regulation VIII of 1819, s. 17, cl. 6, exactly in the mode stated in her plaint, yet, as it was a case in which it

Principle.

Darpatnidar cannot claim damages if in arrears.

Substantial compliance sufficient.

was exceedingly likely that the plaintiff might have some doubt as to who was the person (mother or daughter) to whom rent was due, she had complied substantially with the requirements of the law by payment of the rent for the period for which the rent of the superior landlord was unpaid (*Soorja Kumari Bibi* v. *Degumbari Dassi*, 21 W. R., 219).

When defaulter to receive excess unclaimed.

Seventh.—Should no claims upon the purchase-money of a *taluk* sold as above be brought forward by any under-tenants or assignees, within the period of two months from the date of sale, or should the amount claimed by those who may have sued not equal the entire deposit, the defaulter whose tenure may have been sold shall be at liberty to petition the Court for the amount so held in deposit, or for the excess thereof, as the case may be, and he shall receive a certificate, under the seal of the Court, of there being no claims to afford ground of detention for the whole or any part of the deposit; and, upon exhibiting such certificate to the Collector, the amount set free thereby shall be paid to his receipt.

In the same manner, upon executing a decree passed in favour of any under-tenants or assignees, they shall receive certificates under the seal of the Court, declaring the amount adjudged to them out of the deposit; and, upon exhibiting these certificates, the amount shall be paid severally to their receipts by the Collector.

Notes.

Tenancy Act.

Corresponding section in Tenancy Act.—S. 169(*d*) of the Bengal Tenancy Act provides: "The balance (if any, *i.e.*, after the payments referred to in clauses (*a*), (*b*), (*c*), see *ante*, have been made) remaining after the payment of the rent mentioned in cl. (*c*) shall, upon the expiration of 2 months from the continuation of the sale, be paid to the judgment-debtor upon his application."

Substitution of Government securities for cash in deposit.

Eighth.—It shall be competent to any party, interested in a deposit, to withdraw the whole or any part thereof, on substituting Government securities, bearing interest, in lieu of the money so held in deposit; such securities to be taken at the rate of discount or premium of the day, as shown by the Government Gazette last received.

18-19. [*Rules regarding the attachment of the land of the defaulter; summary process against the person of the defaulter*]. *Repealed by Act X of* 1859, *section* 1.

REGULATION I OF 1820.

PASSED ON THE 11TH OF JANUARY, 1820.

A Regulation for providing that all sales of certain taluks, made answerable by sale for arrears of the zamindar's rent, shall be conducted in the mode prescribed by Regulation VIII, 1819, for the sales therein described.

Preamble.

1. Whereas it has been omitted to provide in the rules of Regulation VIII, 1819, whether, in case the proprietor of an estate paying revenue to Government should desire to bring to sale a saleable tenure of the nature defined in clause first, section 8, of that Regulation, for the realization of arrears of rent due thereupon, by any legal process other than that prescribed by the second and third clauses of the said section, such sale should be made in the public manner provided for the periodical sales therein described;

and whereas it is consonant with justice, and was intended by the said Regulation, that, in every case of the sale of such tenures for arrears of the zamindar's rent, the sale should be public, for the security of the interests of the owner of the tenure sold; which object can in no manner be duly secured except the sales to be so made be conducted by an officer of Government in the same manner as the periodical sales provided for by section 8 of the said Regulation:

The following additional rule has accordingly been passed by the Governor-General in Council, to take effect from the date of its promulgation, within the several districts of Bengal, including Midnapore.

Notes.

Applies to whole of Bengal with some exceptions.

Local Extent.—The Regulation extends to the whole of Bengal. It is in force in the Sonthal Parganas; but its application in the other de-regulationalised tracts is barred as follows, namely:—In the Angul District, by the Angul District Regulation, 1894 (I of 1894), section 3(2), and in the Chittagong Hill Tracts, by the Chittagong Hill-tracts Regulation, 1900 (I of 1900), section 4(2).

Effect of the Regulation.—Section 2, Act VIII of 1835, speaks of "sales for the recovery of arrears of rent or revenue held under clause 7, s. 15, or clause 6, s. 23, or s. 25, Regulation VII, 1799." Clause 7, s. 15, says:—"If the defaulter be a dependent *talukdar*, or the holder of any other tenure, which, by the title-deeds or established usage of the country, is transferable by sale or otherwise, it may be brought to sale by application to the *Diwani Adalut* in satisfaction of the arrear of rent." "There are," observes Field in his Regulations, p. 513, "two classes of tenures here spoken of, *viz.*:—(1) tenures transferable by the title-deeds; (2) tenures transferable by the established usage of the country. Section 8 of Regulation VIII of 1819 speaks of the first class only, *viz.*, 'tenures upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure'—and a sale of tenures of this class, when made under Regulation VIII of 1819, conveyed the tenure free of all incumbrances that accrued upon it by the act of the defaulter (s. 11). In case of a sale of a tenure of this class made otherwise than under the Regulation, this result did not follow, for cl. 7, s. 15, Regulation VII of 1799, did not declare that a sale should have this effect, and there was no other Regulation which did. This anomaly was, however, remedied by Regulation I of 1820 which enacted that tenures of the nature defined in cl. 1, s. 8, Regulation VIII of 1819, *i.e.*, tenures of the first of the above classes, when brought to sale under any summary process authorized by the Regulations, should be sold in the mode prescribed by Regulation VIII for the periodical sales allowed thereby. Clause 2 of s. 2 further made applicable to all such sales the rules of ss. 9, 11, 13, 15 and 17. The result was that after the passing of Regulation I of 1820, whenever a sale of a tenure of the first of the above clause took place for arrears of rent, whether such sales were made under the provisions of s. 8, Regulation VIII of 1819 or under any summary process authorized by the Regulations, the sale passed the tenure free of all incumbrances which had accrued by the act of the defaulter, with the exception of those mentioned in cl. 3, s. 11, Regulation VIII of 1819."

Rules of Regulation VIII, 1819, for periodical sales for zamindar's arrears of rent extended to other sales for rent.

2. *First.*—Whenever the proprietor of an estate paying revenue to Government shall desire to cause any tenure of the nature of those described in clause first, section 8, Regulation VIII, 1819, to be sold for arrears of rent due to him on account thereof, and shall, under any summary process authorized by the general Regulations, have acquired the right of causing such sale to be made, the same shall be conducted, after application from the zamindar, by the Registrar or acting Registrar of the Zila or City Court, or, in his absence, by the person in charge of the office of Judge of the district, in the mode prescribed by Regulation VIII above quoted, for periodical sales.

Notice by proclamation.

Second.—Ten days' notice shall be given before proceeding to sale, by proclamation to be stuck up at the cutcherry of the Court and at that of the Collector of the district.

Rules extended to sales hereunder.

Third.—The rules of sections 9, 11, 13, 15 and 17, Regulation VIII, 1819, are extended to all sales made after the manner herein provided.

Notes.

In section 2 the word "Law" has been substituted for the words "the General Regulations," and the words "or city" have been repealed by Act I of 1903.

THE FORFEITED DEPOSITS ACT, 1850.

(BEN. ACT XXV OF 1850.)

Passed on the 14th June, 1850.

An Act for the forfeiture to Government of deposits made on incomplete sales of land under Regulation VIII, 1819.(1)

WHEREAS *patnidars*(2) fraudulently avail themselves of the provision(3) in section 9, Regulation VIII, 1819, of the Bengal Code(4) that forfeited deposits at sales of land(5) for arrears of rent shall be applied as if they were purchase-money it is enacted as follows :— Preamble.

Notes.

Local Extent.—As this Act supplements Regulation VIII of 1819, its local extent must be taken to be the same as that of the Regulation. Local extent

The Act has been declared, by notification under the Scheduled Districts Act, 1874 (XIV of 1874), s. 3, to be in force in the following scheduled districts, *viz.*,—the Hazaribagh, Ranchi, Palamau and Manbhum districts, and pargana Dalbhum and the Kolhan in the Singhbhum district in the Chota Nagpur Division.

The Act is in force in the Sonthal Parganas; but its application in the other de-regulationised tracts is barred as follows, *viz.*, —in the Angul district by the Angul District Regulation, 1894 (I of 1894), s. 3(2), and in the Chittagong Hill Tracts by the Chittagong Hills Tracts Regulation, 1900 (I of 1900), s. 4(2).

1. [*Repeals*] *Repealed by the Repealing Act*, 1870 (*XIV of* 1870).

2. Any such forfeited deposit shall be applied to defray the expenses of the sale, and the surplus shall be forfeited to Government. Application of forfeited deposits.

(1) The words and figures "and Act IV, 1846" in the title, which were repealed by the Repealing and Amending Act, 1891 (XII of 1891), are omitted.

(2) The words "and judgment-debtors" in the preamble, which were repealed by the Repealing and Amending Act, 1891 (XII of 1891), are omitted.

(3) The provision referred to was repealed by section 1 of the present Act.

(4) The words and figures "and in section 5, Act IV, 1846," which were repealed by the Repealing and Amending Act, 1891 (XII of 1891), are omitted.

(5) The words "in execution of decrees or," which were repealed by the same Act, are omitted.

THE RENT RECOVERY ACT, 1853. (1)

(ACT VI OF 1853.)

(*15th April*, 1853.)

An Act relating to summary suits for arrears of rent, to sales of patni taluks and other saleable tenures, and to sales of land in satisfaction of summary decrees for rent.

Preamble.

WHEREAS, by Regulation VIII, 1831,(2), of the Bengal Code, the hearing and decision of summary suits, or claims relating to arrears or exactions of rents, were transferred from the Judges of the Zila or City Courts to the Collectors of land-revenue of the several districts;

And whereas, by Regulation VII, 1832,(3) of the Bengal Code, the conduct of sales of *patni taluks* and other saleable tenures under Regulations VIII, 1819,(4) and I, 1820,(5) of the same Code, and the performance of other acts preparatory to, or connected with, such sales, were transferred to the Collector, or Deputy Collector, of Land-Revenue or Head Assistant to the Collector or Deputy Collector, subject to an appeal as therein provided;

And whereas by Act VIII, 1835,(6) the power theretofore vested in the Judge of the Diwani Adalat of selling land in satisfaction of summary decrees for rent was transferred to the Collectors of land-revenue, and it was enacted that all sales for the recovery of arrears of rent held under clause 7, section 15, Regulation VII, 1799, (6) should be conducted by the Collector, his Deputy or duly authorized Assistant, and that ten days' notice should be given

(1) Short Title.—This short title was given by the Amending Act, 1897 (V of 1897), Sch. III.

(2) Ben. Reg. VIII of 1831 was repealed by the Bengal Rent Act, 1859 (X of 1859).

(3) Ben. Reg. VII of 1832 was repealed by the Bengal Civil Courts Act, 1871 (VI of 1871).

(4) The Bengal Patni Taluks Regulation, 1819.

(5) The Bengal Patni Taluks Regulation, 1820.

(6) Act VIII of 1835 and Reg. VII of 1799 were repealed by the Repealing Act, 1874 (XVI of 1874).

of such sales by advertisement to be stuck up at the cutcherry of the Zila Court or local Adalat and that of the Collector....(1);

And whereas doubts may be entertained as to who ought to exercise the jurisdiction transferred by the above-mentioned Regulations and Acts, where lands situate within the zila or other district of one Collector form part of an entire estate paying revenue to the Collector of another zila or district;

In order therefore to avoid such doubts, and also to define who are the proper officers to exercise such jurisdictions in cases where lands are situate in a district assigned to an independent Deputy Collector, and also in cases where lands held in *patni* or other tenure at one entire rent are situate in two or more Collectorates—(2); It is enacted as follows:—

Notes.

Local extent.—This Act contains no local extent clause, but the intention probably was that it should extend to the same areas as the enactments cited in the preamble.

The Act has been declared, by notification under the Scheduled Districts Act, 1874 (XIV of 1874), s. 3, to be in force in the following Scheduled Districts, namely:—

the Hazaribagh, Ranchi, Palamau and Manbhum Districts, and Pargana Dhalbhum and the Kolhan in the Singhbhoom District, in the Chota Nagpur Division.

The Act is in force in the Sonthal Parganas; but its application in the other de-regulationised tracts in Bengal is barred as follows, namely:—

in the Angul District, by the Angul District Regulation, 1894 (I of 1894) s. 3 (*c*); and

in the Chittagong Hill Tracts, by the Chittagong Hill Tracts Regulation, 1900 (I of 1900), s. 4 (*c*).

Conduct of sale of land when all in one Collectorate;

1. If the lands which may be the subject of any such sale, or to the rent of which any such suit may relate, be all situate in one Collectorate, the Collector of such Collectorate is the Collector to conduct the sale or to hear and decide the suit.

When in two or more Collectorates.

If one *taluk* or tenure shall comprise lands situate in two or more Collectorates, or if any lands situate in two or more Collectorates

(1) Portion of the preamble relating to Act XXV of 1850 and Reg. VIII of 1819, s. 9, which was repealed by the Repealing and Amending Act, 1891 (XII of 1891), is omitted.

(2) The words "and to prevent any such decision or sale already made from being held invalid upon the ground of its having been made by an officer of a wrong district," which were repealed by the Repealing and Amending Act, 1891 (XII of 1891), are omitted.

be held under one lease or engagement or at one entire rent, the Collector in whose Collectorate the greater part of such lands shall be situate is the Collector to conduct the sale of such *taluk* or tenure or of such lands, and to hear and decide any summary suit relating to arrears or exactions of rent in respect thereof.

Procedure in case of doubt as to officer having jurisdiction.

2. If a Collector to whom application shall be made to exercise any of the powers above-mentioned shall entertain any doubt as to whether the lands or the greater part of them are situate within his Collectorate, he shall report the case for the order of the Board to which he is subordinate, and, if ordered by such Board to proceed in the matter, such order shall be conclusive upon the question of his jurisdiction.

"Collectorate" defined.

3. The word "Collectorate" in this Act means the zila or other district to which a Collector is appointed, and no lands situate beyond the limits of such zila or district shall be deemed to be situate within the Collectorate by reason of their forming part of an estate paying revenue to the Collector thereof.

Powers and jurisdiction of independent Deputy Collector.

4. An independent Deputy Collector may, within his Deputy Collectorate, exercise all the powers and jurisdictions of a Collector with which he may be entrusted, in the same manner and to the same extent as a Collector may do within his Collectorate; and, with reference to the exercise of such powers and jurisdictions, his Deputy Collectorate shall be deemed a Collectorate, and he shall be deemed to be a Collector within the meaning of this Act.

"Independent Deputy Collector."

5. An independent Deputy Collector is an officer appointed by Government to act as Deputy Collector independently of a Collector, whether his office is one for the receipt of revenue or not.

"Deputy Collectorate."

A Deputy Collectorate is the district within which an independent Deputy Collector is directed by Government to act.

Publication of notice of sale by independent Deputy Collector.

6. In cases of sales by an independent Deputy Collector under the above-mentioned Regulations or Act, any notice thereby required to be stuck up at the cutcherry of the Collector may be stuck up at the cutcherry of the Deputy Collector.

Exercise of powers of independent Deputy Collector.

7. An independent Deputy Collector may exercise the powers assigned to him over any part of his Deputy Collectorate in public cutcherry, in whatever part of his Deputy Collectorate the same may be situate or held.

Publication of notice required by law to be advertised.

8. Any notice required by the above-mentioned Regulations or Act to be given by advertisement to be stuck up at the cutcherry of the Zila Court or local Adalat shall be stuck up at the Zila Court

or local Adalat within the jurisdiction of which the lands to be sold, or the greater portion of them, as the case may be, shall be situate.

9. [*Order, etc., not to be disputed on ground that Collector was not the Collector of proper district.*] *Rep. by the Repealing Act*, 1873 (*XII of* 1873).

10. [*Extension of certain enactments to all sales under Act VIII of* 1835]. *Rep. by the Bengal Rent Recovery* (*Under-tenures*) *Act*, 1865 (*Ben. Act VIII of* 1865).

THE BENGAL RENT RECOVERY ACT, 1865.

BEN. ACT VIII OF 1865.

(*Received the assent of the Lieutenant-Governor on the 10th May, 1865, and of the Governor-General on the 27th idem.*)

An Act to amend the law for the sale of such under-tenures as by the title-deeds or established usage of the country are transferable by sale or otherwise for the recovery of arrears of rent due in respect thereof.

Preamble.

WHEREAS doubts have arisen, in consequence of the repeal of section 16 of Regulation VII of 1832, as to the authority by whom *patni taluks* and other saleable under-tenures of the nature defined in clause 1 of section 8 of Regulation VIII of 1819 are to be sold for arrears of rent due to the proprietor on account thereof; and whereas it is expedient to amend the law for the sale of under-tenures in satisfaction of decrees for the recovery of such arrears; it is enacted as follows:—

Notes.

Another title.

Another title.—This Act is also called "The Bengal Rent Recovery (under-tenures) Act of 1865." This short title was given by the Repealing and the Amending Act, 1903 (I of 1903), Sch. I.

Application of the Act.

Application of the Act.—See notes in s. 8 of Regulation VIII of 1819 under the head "Two classes of transferable tenures." Observe that Regulation VIII of 1819 and Regulation I of 1820 deal with tenures which are transferable by title-deeds and not with tenures which are transferable by the established usage of the country. Act VIII of 1865 deals with both.

It should be noticed that this law deals also with the sale of under-tenures in satisfaction of decrees for arrears of rent. "The tenures transferable by the title-deeds or established usage of the country spoken of in s. 15, Regulation VII of 1799," observes Mr. Justice Field in his Regulations at pp. 517-518, "were tenures held under a zamindar, *talukdar* or proprietor, or farmers of land (see cl. 1), *i.e.*, under a person who had engaged direct with Government. That law does not appear to have contemplated tenures in the second degree or still lower, which I may designate by the term 'sub-tenure,' the word 'under-tenure' having become obscure and indefinite.

Section 16, Regulation VIII of 1819, would appear to have first provided for the sale of sub-tenures, but its provisions were limited to a certain class of sub-tenures, *viz.*, those held under engagements similar to those executed between the zamindar and the *patnidar*, and which had been declared (by s. 4, read with cl. 3 of s. 3 of the Regulation) not to be voidable for an arrear of the rent fixed upon them in perpetuity. There would appear to have been no law which directly provided for the sale of sub-tenures other than these. As a matter of fact, however, a practice sprang up of selling sub-tenures of various kinds not belonging to this class. Section 105 of Act X of 1859 and Act VIII (B. C.) of 1865, apply to sub-tenures (as well as tenures) of all kinds, which are transferable by the title-deeds or the custom of the country, there being no distinction between decrees for rent obtained by landlords under direct engagements with Government and other landlords."

Local extent.

Local extent.—The Act has been declared to be in force in the Sonthal Parganas by Regulation III of 1872, s. 3, as amended by Regulation III of 1886, ss. 2 and 6, in the districts of Hazaribagh, Lohardugga, Manbhum and Pargana Dhalbhoom (in the district of Singhbhoom) under s. 3 of the Scheduled Districts Act, 1874, and by the Bengal Government Notifications Nos. 1395, 1396, 1397 and 1398 dated the 21st October, 1881. In the case of *Parohit Govind* v. *Bhupal* (10 C. L. R., 76), the question was raised whether the Act applied to the district of Lohardugga and it was held that it did. The Judges observed :—"There is nothing in Act VIII, B. C., of 1865 to show that its intention was to exclude this district from its operation; and a very strong inference is raised from the fact that in the Notification dated the 22nd October, 1881, under s. 3 of Act XIV of 1874, the Local Government declares it to be in force." The application of the Act is barred in the Chittagong Hill Tracts by s. 4 (2) of the Chittagong Hill Tracts Regulation (I of 1900) and in the Lushai Hills by notification.

Object of the Act.

Object of the Act.—"Clause 1, s. 16, Regulation VII of 1832, modified the provisions of this Regulation and of Regulation I of 1820 as to the person by whom sales should be conducted, and enacted that such sales should be made in future by the Collector or Deputy Collector or Head Assistant to the Collector, subject to an appeal to the Commissioner of Revenue for the Division on the ground of the irrelevancy of the Regulation. The whole of s. 16, Regulation VII of 1832 was, however, repealed by Act X of 1861, in so far as it relates to the territories to which Act VIII of 1859 has been or may be extended, saving however so far as the said section repealed the whole or part of any previous Regulation (see s. 1 and sch., Act X of 1861). It is to be observed that cl. 1, s. 16, Regulation VII of 1832, expressly repealed nothing. The words 'repeal' 'rescend', do not occur therein, the word modified alone being used. It might seem therefore that the effect of the repeal of s. 16, Regulation VII of 1832 was to leave the law in the same position in which it had been before the passing of this Regulation. The doubt was set at rest, so far as regards the Lower Provinces of Bengal by Act VIII (B. C.) of 1865." Field's Regulations pp. 511-512.

Partial repeal.

Partial repeal.—Sections 4 to 17 and the schedule have been repealed in Assam by the Repealing and Amending Act (V of 1897). They appear to be obsolete in districts in which the Bengal Rent Act (X of 1859) has been repealed and the Bengal Tenancy Act of 1885 introduced. A nice

question may arise as to whether a Civil Court in a district like Sylhet, in which Act VIII (B. C.) of 1869 is still in force, has power to sell one of the tenures mentioned in this Act in execution of its own decree for rent which accrued thereon. Act VIII of 1869 does not repeal, amend or alter Act VIII of 1865, section 3 of which enacts that such sales are to be conducted by the Collector. Sections 59 to 63 of the Act of 1869 appear to contemplate a sale by the Civil Court, in as much as they provide a sale procedure, which would be unnecessary if the sale was to be made by the Collector by the Act of 1865.

Meaning of the word "Collector."

1. The word "Collector" as used in this Act includes all Officers exercising the full powers of a Collector of a district.

(*Note.*—The second sentence of the section repealed by Act I of 1903 has been omitted.)

2. [*Laws repealed*]. *Rep. by the Repealing Act of* 1873 (*XII of* 1873).

Sale by whom to be conducted.

3. The sale for the recovery of arrears of rent of *patni taluks* and other saleable under-tenures of the nature defined in clause 1 of section 8 of Regulation VIII of 1819, shall be conducted by the Collector of Land Revenue in whose jurisdiction, as defined by Act VI of 1853, the lands lie, and all acts preparatory to, or connected with, the sale of such under-tenures as aforesaid, which, by Regulations VIII of 1819 and I of 1820, the Judge is required to perform, shall be performed by the said Collector.

Notes.

Act VI of 1853—See *ante*.

Meaning of Collector.—On an enquiry made by a Commissioner as to whether a Deputy Collector, appointed under Regulation IX of 1833, can exercise all or any of the powers of a Collector, the Board ruled that as, under this section, a Deputy Collector is not the "Collector of Land Revenue," he cannot hold *patni* sales. Deputy Collectors can, however, hold sales of under-tenures in execution of a decree under the provisions of the following section. (Board's Miscellaneous Proceedings of April, 1809, No. 125.)

Board's Proceedings.

Notice of sale where to be hung up.

4. Whenever a decree for an arrear of rent, due in respect of an under-tenure saleable under the provisions of section 105 of Act X of 1859, shall have been obtained, and an application for the sale of the said under-tenure under the same section shall have been made and allowed, the Collector, in whose Court the decree is in course of execution, shall thereupon cause to be hung up in his own Court and in that of the Collector and the Judge of the district, within which the land comprised in the under-tenure to

be sold is situated, and to be affixed on some conspicuous place on the land and in the town or village in or nearest to which the said land is situated, a notice for the sale of the said under-tenure on some fixed date not less than twenty days from the hanging up of the said notice in the Court in which the decree is in course of execution.

Notes.

S. 105, Act X of 1859.

Section 105, *Act X of* 1859.—The section is as follows:—"If the decree be for an arrear of rent due in respect of an under-tenure, which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures, for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force. But no such application shall be received when a warrant of execution has been previously issued against the person or movable property of the judgment-debtor, so long as such warrant remains in force. If, after sale of an under-tenure, any portion of the amount decreed remains due, process may be applied for against any other property, movable or immovable, belonging to the debtor, and any such immovable property may be brought to sale in the manner provided in section 110 of the Act."

Kinds of transferable tenures.

Transferable Tenures.—The *patni*, *darpatni*, *sepatni* and other similar tenures are declared transferable by s. 3, Regulation VIII of 1819. All permanent tenures and holdings at fixed rates are made transferable by ss. 11 and 18 of the Bengal Tenancy Act. All other holdings and tenures may be transferable by local custom or usage.

Transferable by custom.—See ss. 23 and 183 of the Bengal Tenancy Act (VIII of 1885). Observe that, under this Act, a right of occupancy is transferable by custom or usage, but, under Act X of 1859, it is transferable by custom only.

Occupancy-rights.

As a general rule it has been laid down by the judgment of a Full Bench that, when a tenure was not transferable before the passing of Act X, the passing of that Act would not have the effect of rendering it a transferable tenure; but that ruling specially exempts cases in which rights of occupancy, or tenures of a similar description, were transferable by local custom. It has never been ruled that under no circumstance can a right of occupancy be transferred—(*Nukoo Roy* v. *Mahabir Persad*, 11 W. R., 405). In the Full Bench case of *Narendro Narain Chowdry* v. *Ishan Chundra Sen* (22 W. R., 22; 13 B. L. R., 274), Couch, C. J., observed: "The question, as I have answered, is solely upon the Act, and independent of the existence of any custom." But, in order to make a right of occupancy transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated; where no mention is made in a *dowl* of any right to transfer, the existence of the power to transfer cannot be presumed—(*Unnopurna* v. *Oma Churn*, 18 W. R., 55; *Musst. Shunkerputtee* v. *Mirza Saifulla*, 18 W. R., 507; *Bootee Sing* v. *Moorat Sing*, 20 W. R., 478). In *Joykishen* v. *Rajkishen*, (1 W. R., 153) the Court observed: "In every

district of Bengal there is a different custom, and this question (whether the tenure is transferable by custom) can only be decided by reference to local custom. What is the custom in Lower Bengal is not so in the eastern and the northern parts, and *vice versa*. In some parts the *khudkast* tenants are allowed to sell without reference to their landlord; in other parts the practice has not been allowed; and the only method, by which the question in each case can be decided, is by reference to local custom, and not by the evidence of a few antagonistic witnesses. We, therefore, remand the case to the Judge for the purpose of a local investigation, made with regard to the custom that prevails in that part of the district in which these lands are situate." In *Chunder Kumar* v. *Peary Lall* (6 W. R., 190), the Court (Travor and Campbell, JJ.) remarked: "The Judge has held as a fact that the custom of Hooghly does not sanction the transfer of *khudkast-jotes*. That point has not been brought before us, and, as the fact depends upon evidence, we cannot interfere in special appeal. We think it right to say, however, that a custom of this nature need not be absolutely invariable; it can be proved by evidence amounting to much less than this. Moreover, the case, which the Judge cites from the Sudder Reports, refers to Moorshedabad and not to Hooghly, and therefore can be no authority for proving a custom in the former district." So in *Joy Kishen* v. *Durga Narain* (11 W. R., 348), the Court said: "It has been found in evidence that jamas, such as the one held by the defendants Nos. 3 and 4, are, by custom of this particular village, transferable; there was no necessity for the witnesses to fix any particular time from which such tenures became transferable from one party to the other. It was sufficient that there was evidence, which the Principal Sadar Amin has credited, of the antiquity of the custom (and this evidence, we may remark, he has given very cogent reasons for crediting) to establish the fact that there is at present the custom referred to and that no evidence to the contrary was adduced. It seems to us that this was legally sufficient evidence, and that we have no power to interfere in special appeal." But the custom must be a custom that sales are effected in spite of the landlord, and proofs of instances of sale must be such that the sales took place without the consent of the zemindar and still held good. In *Bibi Sohodwa* v. *Mr. Maxwell Smith* (20 W. R., 139), Phear, J., observed: "The Judge says that he arrives at the conclusion that the transfers from the raiyats to the defendant, upon which the defendant relies, are proved; and also that these raiyats had tenures which they were capable of transferring. But it appears very clear that, in dealing with the evidence, the Lower Appellate Court very seriously misapprehended the force of a considerable portion of it. We refer to the evidence of sales held in execution of decrees, the evidence consisting partly of parol testimony, and partly, we believe, of certificates of sales. But in all these instances of sales, so far as they have been brought to our notice, the sales were sales in execution effected at the instance of the zamindar himself; and consequently they could not be evidence of the right on the part of the raiyats to transfer without the assent of the zamindar." So in *Bootee Sing* v. *Moorat Sing* (20 W. R., 478), Phear, J., remarked: "Both the first Court and the Lower Appellate Court were agreed in thinking that the defendants Nos. 1 and 2 had failed in proving that they had an old *gorabandi* right to their jote; but the Lower Appellate Court, upon the evidence which it refers to, was of

Khudkast-jotes.

Antiquity of custom need only be proved.

Sales must be without consent of landlord.

opinion that these defendants had gained a right of occupancy under the rent-law, and that such a right of occupancy was in their village, and in their neighbourhood recognised as a transferable right, irrespective of the will of the zamindar. It seems to us more than doubtful whether any evidence could establish that a bare right of occupancy under the Act was transferable irrespective of the will of the zamindar. But however this may be, we are quite clear that the evidence upon which the Subordinate Judge bases his opinion is insufficient for that purpose. All the transfers to which he refers are in terms transfers of a *gorabandi* right; therefore the subject which was transferred by them was something very different from the bare occupancy-right to this land, which was all that the Subordinate Judge found to be the right of the first two defendants. This being so, we think the Subordinate Judge was wrong in holding that the transfer of the land in question from the first two defendants to the defendant of the second party was valid against the zamindar." There is nothing unreasonable in the custom by which the tenure of a *khudkast raiyat*, who has built a *pucca* house on his land and has acquired a right of occupancy under s. 6, Act X, is a transferable tenure (*Chandra Kumar Roy* v. *Kedarmoni Dasi*, 7 W. R., 247). According to the custom of the Hooghly district, a tenure granted for building purposes is transferable (*Bani Madhab* v. *Joy Kishen*, 12 W. R., 595), which confirms the opinion of the senior Judge, Kemp, J., in the same case reported in 11 W. R., 354; (compare also *Durga Prosad* v. *Brindabun*, 15 W. R., 274; *Nidhi Kisto* v. *Nistarini*, 21 W. R., 386). A *kadimi* or *mouruci* holding is something very much larger than what is known as a right of occupancy under the rent law; and where, according to the custom of the country, such a holding is a transferable tenure, the purchaser takes the whole of the rights of the previous holder against the zamindar (*Nanda Kumar* v. *Lakhi Prya*, 23 W. R., 36).

Instances.

Elements of custom.—The custom must be clear and well-defined (*Dwarkanath* v. *Harish Chandra*, I. L. R., 4 Cal., 925). The existence of a custom in a particular district, however, by which a right of occupancy in such a district is transferable, will not justify the holder of such right in sub-dividing his tenure, and transferring different parts of it to different persons; and in case of such transfer the zamindar is entitled to treat the transferees as trespassers and eject them (*Tirthanund Thakoor* v. *Mutty Lall Misser*, I. L. R., 3 Cal., 774). It must be ancient, certain and reasonable, and must be construed strictly (*Hara Prasad* v. *Sheodayal*, I. L. R., 26 Cal., 55; s. c., 3 I. A., 285). Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and that it is certain and not indefinite in its character (*Lala* v. *Hira Singh*, I. L. R., 2 All., 49; *Lachman Rai* v. *Akbar Khan*, I. L. R., 1 All., 409; *Jamila Khatun* v. *Pagal Ram*, 1 W. R., 250; *Bhagwan Dass* v. *Balgovind Sing*, 1 B. L. R., S. N., 9). In *Lachmipat Singh* v. *Sadatulla Nasya* (I. L. R., 9 Cal., 698; 12 C. L. R., 382), the necessity for a custom being reasonable was insisted on. In *Bani Madhab Banurji* v. *Jai Krishna Mukherjee* (7 B. L. R., 152; 12 W. R., 495), Justice Glover pointed out that "a custom must be proved by strict evidence that what is sought to be established has existed unaltered and uninterrupted from time immemorial." In *Chandra Kumar Rai* v. *Prya Lall Banurji* (6 W. R., 190), however, Tre-

Custom must be clear and well-defined.

Must be ancient, certain and reasonable.

vor and Campbell, JJ., laid down that a custom as to the transferability of *khudkhast-jotes* in the Hooghly district need not be absolutely invariable, but Glover, J., in *Beni Madhub Banurji* v. *Joy Krishna Mukhurji*, referred to above, said he had doubts as to the correctness of this decision.

Remarks of of the Rent Commission.

How custom is proved.—The Rent Commission remarked: "We have provided that nothing in the Bill shall affect any custom or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions. The mode of proving custom is not very well understood in this country, and unfortunately, notwithstanding a dictum of Sir Barnes Peacock (see *Hill* v. *Iswar Ghose*, W. R., F. B., 156, and *Thakurani* v. *Biseswar*, B. L. R., F. B., 326) to the contrary, an idea got to prevail that Act X had superseded all customs, and was intended to do away with all agricultural rights, except those especially mentioned and provided for in that Act. We believe that there are many local customs, in this as well as in every other country, well understood by the people, recognized by the landlords, and susceptible of proof in the Courts of Justice, and we think it very desirable to make it clearly understood that the Bill is not intended to interfere with any of these, unless they have been expressly rescinded by, or are clearly inconsistent with, its provisions." In *Lachman* v. *Akbar* (I. L. R., 1 All., 440) the plaintiffs, as zamindars, sued their tenants for a declaration of their manorial rights, as against all the tenants collectively, to all trees of spontaneous growth, and to the fruits of mango, mohua and other trees planted by the defendants, and of their right to receive a tribute of two ploughs annually, as also an offering of a certain quantity of poppy-seed, hemp, bhusa, cow-dung cakes, and other farm produce on the occasion of the marriage of the lower caste tenants, with a further right to levy as dues from the said tenants a proportionate quantity of sugarcane juice prepared by each sugar manufactory, and the presentation of a certain number of sticks of sugarcane on a certain day in each year to the plaintiff. The High Court, in remanding the case for further inquiry, observed: "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by revenue or judicial records or private accounts and receipts that the custom has been enforced." To prove a local custom, evidence must be precise and conclusive.—(*Tekait Durga Prosad* v. *Tekait Durga Kumar*, 20 W. R., 154). The custom must be of that part of the country where the tenancy is situate. (*Annapurna* v. *Uma Charan*, 18 W. R., 55). Until some connection, either geographical or political, is shown to exist between any two districts there is no ground for inferring the custom of one district from its existence in another (*Maharani Heyanath* v. *Burni Narain*, 17 W. R., 329). In *Kupil Rai* v. *Radha Prosad Sing* (I. L. R., 5 All., 261), it appeared that the defendants were occupancy-tenants of certain lands, that these lands were submerged and re-appeared after some years, and the tenant neither relinquished nor paid rent for them; it was *held* that the claim of the landlord that he was entitled to them, according to a local custom, was not tenable with reference to the provisions of Act XII of 1881 (N. W. P., Rent Act).—See *Luchmiput* v. *Sadatulla*, 12 C. L. R. In an enquiry as to whether tenures of a certain class are transferable according to local custom, it is sufficient if

Enumeration of instances and records most cogent evidence.

Evidence must be precise and conclusive.

there is credible evidence of the existence and antiquity of the custom, and none to the contrary; there is no necessity for the witnesses to fix any particular time from which such tenures become transferable (*Jai Krishna Mukherjee* v. *Durga Narain Nag*, 11 W. R., 348).

Onus on person who claims transferability.

Onus of proof.—There is no presumption that any tenure held is not a transferable tenure, and a landlord, who sues for *khas* possession on the ground that a tenure was not transferable, must establish his case as an ordinary plaintiff (*Doya Chand* v. *Anund Chunder*, I. L. R., 14 Cal., 382). The correctness of this decision is extremely doubtful. The learned Judges (Prinsep and Beverley, JJ.) observe: "In the course of the argument some cases have been cited from the Weekly Reporter, but it is impossible for us to apply the law laid down in those cases because in none of them are the facts stated. We are of opinion that the case of *Dwarkanath* v. *Hurish Chunder* is not applicable. In that case it was admitted or found that the defendants had occupancy-rights, and the learned Judges of this Court in their judgment proceeding on the Full Bench case, *Narendra Narain* v. *Ishan Chandra*, *held* that it was for the defendant to prove that such right was transferable. There is nothing in that case to establish the proposition now contended for that it is for the tenant or the person, who claims to be the tenant, to establish his right to retain the land in any suit brought against him by the zemindar, or whenever the zamindar may think proper to call upon him to show his title. In our opinion the plaintiff is bound to start his case." But the Court forgot that the Full Bench in *Narendra Narain* v. *Ishan Chunder* had held that the occupancy-right is a creation of Act X and is not transferable *ipso facto*. It is, therefore, on the party, who asserts that it is transferable, to prove that fact. See *Sankarpati* v. *Saifulla*, (18 W. R., 507). Suppose an occupancy-right is proved in a suit like the above and the question is whether it is transferable, the proper test would be to see, who would fail, if none would offer evidence? Assuredly, the tenant or the purchaser. The effect of the decision under comment was practically to disturb the settled case-law on the point. There has been a contrary decision since. The onus of proving the transferability of a raiyat's holding is upon the party who alleges it to be of a permanent and transferable character.—*Kripamayi* v. *Durgagobind*, (I. L. R., 15 Cal., 89).

Notice of sale what to contain.

5. The said notice shall specify, in the words used in the plaint in the suit in which the decree was made, the name of the village, estate, and pargana or other local division, in which the land comprised in the said under-tenure is situated, the yearly rent payable under the said under-tenure, and the gross amount recoverable under the said decree.

How the sale may be stopped.

6. If the sum due under the decree, together with interest to date of payment and all costs of process, be paid into Court at any time before the sale commences, whether by the defaulting holder of the under-tenure or any one on his behalf, or any one interested in the protection of the under-tenure, such sale shall not take place; and the provisions of section 13 of Regulation VIII

of 1819, for the recovery of sums paid by other than the defaulting holder of the under-tenure to stay the sale of the under-tenure, shall be applicable to all similar payments made under this section.

Notes.

Under-tenant has security of tenure and may also recover amount by suit.

See notes under s. 13 of Regulation VIII of 1819.

Remedies open to an under-tenant.—The plaintiff brought a suit to recover with interest certain moneys deposited by him to protect from sale a superior tenure advertised for sale under the provisions of Act VIII of 1865. *Held* that under cl. 4, s. 13 of Regulation VIII of 1819, which, by s. 6, Act VIII of 1865, is made applicable to payments of this description, the plaintiff's deposit must be considered as a loan made to the proprietor of the tenure to preserve it from sale by such deposit, that the tenure so preserved having become security to the plaintiff, he must be considered to have a lien therein, and that the plaintiff is entitled, on applying for the same, to obtain an immediate possession of the tenure of the defaulter in order to recover the amount so deposited from any profits belonging thereto, but that he was not entitled to recover the sum claimed by him with interest (*Kartik Sarma* v. *Baidonath*, 10 W. R., 205). The Full Bench, however, overruled this decision in the case of *Ambika Debya* v. *Pranhari* (4 B. L. R., F. B., 77 ; 13 W. R., F. B., 1), and *held* that the under-tenant not only has the security of the tenure which he has preserved, and of which he can obtain possession on application to the Collector, but has also a right to recover the amount deposited as a loan in an ordinary suit. See also *Ram Buksh Chulangea* v. *Hridoy Monee Debya* (10 W. R., 446). A *patnidar*, in execution of a decree for rent against his *mouroseedar*, attached certain property belonging to the latter, including a parcel of land belonging to plaintiff, who, in order to save the parcel from sale, paid the whole amount due under the decree, and then sued the *mouroseedar* to recover the amount. The suit having been dismissed on the ground that there was no obligation on the plaintiff to pay the amount, he appealed, alleging that his parcel was within, and subordinate to, the holding of the *mouroseedar*, and that the sale would possibly have jeopardised his right. *Held* that the case was rightly remanded by the Lower Appellate Court, but that the issue to be tried was whether the plaintiff was a party who came under the provisions of s. 6, Act VIII of 1865 read with s. 13, Regulation VIII of 1819, more particularly with cl. 3. (*Lakhi Prya Debya* v. *Brindabun Dey*, 12 W. R., 313.)

Unregistered under-tenant entitled to stop sale.

Rights of an unregistered under-tenant.—Where an under-tenure has been transferred, but the transfer is not registered in the *sherista* of the zamindar or superior tenant, the transferee is nevertheless entitled, as a person interested in the protection of the tenure, to stop its sale, in execution of a decree under Act VIII of 1865, by paying into Court the amount of the decree, though he is not entitled, unless the transfer is registered, to come in and allege that the person, against whom the decree has been obtained, was not the proprietor of the under-tenure, and was not in legal possession (*Ananda Lall Mukherjee* v. *Kali Prasad Misser and others*, 20 W. R., 59). Where the transfer has not been registered, all that the transferee can do is to stop the sale under s. 6, Act VIII of 1865, by paying the money into Court, or, if there has been an

irregularity of which the defendant in the rent-suit could complain and by appealing have the sale set aside on account of it, the transferee may be able to do the same. He is in the same position as the transferor and is not entitled to go beyond that, where there has been no fraud (*Ameenuddin* v. *Khyroonnessa*, 20 W. R., 59).

Payment where to be made and when.—Under s. 6, Act VIII of 1865, any payment of decretal amount, after an application for sale has been presented, must be made into Court. If the money is paid before the commencement of the execution-proceedings, the sale, in execution of a decree for rent, is bad and held without jurisdiction. If the decretal amount is paid out of Court after the execution-proceedings began, the payment would not, under s. 6 of Act VIII of 1865, make the sale a nullity. If the auction-purchaser be a *bonâ fide* purchaser for value without notice, then good or bad, the sale stands, so far as he is concerned, and the usufructuary mortgagee of the holding cannot recover possession as against him, but must seek other remedies (*Ramgopal Aditya* v. *Rajan Sadagar*, 6 C. L. J., 43). **Effect of payment in Court and out of Court.**

7. The under-tenure shall be sold to the highest bidder in open Court. **Sale to be to the highest bidder.**

8. The party, who shall be declared to be the purchaser, shall be required to deposit immediately, in cash or Government currency-notes, twenty-five per cent. of the amount of his bid; and, in default of such deposit, the under-tenure shall be put up again and sold forthwith, or on the next ensuing office day. **Purchase deposit 25 per cent.**

Notes.

See notes under s. 9 of Regulation VIII of 1819. Observe that under that section fifteen per cent. of the purchase-money has to be deposited immediately the lot is knocked down.

9. The full amount of the purchase-money shall be made good by the purchaser before sunset of the eighth day from that on which the sale of the under-tenure took place, reckoning that day as one of the eight; or, if the eighth day be a Sunday or other close holiday, then on the first office day after the eighth day: and, in default of payment within the prescribed period as aforesaid, the deposit shall be forfeited to the Government, and the under-tenure shall be resold, and the defaulting purchaser shall forfeit all claims thereto or to any part of the sum for which the said under-tenure may be subsequently sold. If the proceeds of the sale, which may be eventually completed, be less than the price bid by the defaulting purchaser, the difference shall be leviable from him under the law for enforcing the payment of money in satisfaction of a decree for arrears of rent. **Deposit to be forfeited if balance of purchase-money be not paid up in time.**

Notes.

Corresponding sections in Civil Procedure Code.

See notes under s. 9 of Regulation VIII of 1819.

Re-sale.—Sections 293, 306 and 308 of the Civil Procedure Code deal with the forfeiture of earnest money, re-sale and the realization of the difference between the sale proceeds of the first and second sale. Notice that, under s. 293, the defaulter is liable for the deficiency in price which may happen on a re-sale as also for all expenses attending such re-sale; but under s. 9 of this Act the defaulter is liable for the deficiency in the price only.

Payment to post office.

Date of payment.—Money paid by the purchaser into the post office within time, but not received by the Court in time, is not payment in time (*Ram Chandra* v. *Belya*, I. L. R., 22 Bom., 415). Days, on which the office is open and the purchase-money for property bought at a court-sale could have been paid, are office days (*Moteram* v. *Bhivraj*, I. L. R., 20 Bom., 745).

Provisions as to sales to apply to all re-sales.

10. The provisions of all the sections of this Act with regard to sales, shall also be applicable to all re-sales under this Act, which may be rendered necessary by the default of any purchaser.

Certificate and possession to be given to purchaser on payment by him in full.

11. When the purchase-money shall have been paid in full, the officer holding the sale shall give the purchaser a certificate in the form prescribed in the Schedule annexed to this Act; and shall further, on the purchaser making application and depositing the requisite costs, depute an officer or amin to put him in possession of the under-tenure in the customary manner, and to publish the fact of the purchase to the cultivators of the lands comprised therein.

Notes.

The entire tenure passes.

What passes at a sale under this Act.—As a general rule, when a tenure is sold in execution of a decree under the provisions of Act VIII (B.C.) of 1865, the whole tenure passes, unless there is some reservation made at the time of the sale (*Hargovind* v. *Damante*, 13 W. R., 304; *Sudhu Chunder* v. *Gour Chander*, 15 W. R., 99), and not merely the right, title and interest of the tenant whose name is registered in the zamindari *sherista* (*Fatima* v. *Collector of Tipperah*, 13 W. R., 433). Consequently, where the right, title and interest of *A* in such a tenure was sold in execution of a decree of the Civil Court for debt and purchased by *B*, who did not have the transfer to himself registered in the zamindar's *sherista*; and where, previous to the confirmation of this sale, the zamindar sued *A* for rent, got a decree and in execution thereof sold the tenure, which was purchased by *C*, it was *held* that *B* was not entitled to recover possession from *C* (*Sham Chand Kundu* v. *Brojonath Pal*, 12 B. L. R., 484; 21 W. R., 94). A *raiyati* tenure having been sold for arrears of rent under an Act X decree, the purchaser was held entitled to be put in *khas* possession of the entire tenure as it originally stood, notwithstanding the fact that the sons of the raiyat had been occupying huts on the land for more than 20 years. The circumstance that the purchaser happened to be the superior landlord did not diminish his right (*Telotumma* v. *Brojonath*, 8 W. R., 478). When a decree was for arrears of rent due upon a tenure,

it was *held* that, though the sale-proceedings specified that the rights and interests of certain parties were sold, yet the tenure itself was sold and all the co-sharers were jointly liable (*Alimoddin* v. *Sabir Khan*, 8 W. R., 60); but see contra *Lall Sabil* v. *Goodur Khan* (22 W. R., 187). Where a tenure, inherited by a Hindu widow from her husband, is sold for arrears of rent under Act VIII of 1865, the purchaser does not acquire merely her personal rights, nor do the rights acquired by him cease on her death (*Zuhoorul Huq* v. *Guru Charan*, 15 W. R., 329).

Proceeds of sale how to be dealt with.

12. From the proceeds of the sale of the under-tenure, the officer holding such sale shall repay to the judgment-creditor the necessary expenses incurred by him in procuring it; and, after satisfying the decree in execution of which the sale was made, shall hold the residue, if any, in deposit on account of the defaulting holder of the under-tenure.

Notes.

See notes under s. 17, Regulation VIII of 1819.

Appeal.

13. An appeal shall lie to the Collector from any proceedings of a Deputy or Assistant Collector, if made within fifteen days; and to the Commissioner from any original proceedings of a Collector under this Act, if made within thirty days from the date of the sale: but no proceedings under this Act shall be reversed or modified in appeal except upon the ground of irrelevancy of the law, or of such an irregularity in procedure as, in the opinion of the appellate authority, has caused injury to the interests of one of the parties to the suit in which the decree was passed.

Notes.

Notice.

What invalidates a sale.—The fact that no notice has been served in the mofussil is a sufficient ground for setting aside a sale for arrears of rent (*Nogendro Chandra Ghose* v. *Munsruff Bibi*, 15 W. R., 17).

Non-joinder of share-holders.

Nonjoinder of shareholders does not invalidate a sale. Where a tenure is duly sold for arrears of rent under Act X of 1859 and Act VIII of 1865, the absence of a shareholder's name from the proceedings does not, as a matter of law, invalidate the sale as against such shareholder (*Donbijoy Mahton* v. *Prithee Narain Sing*, 14 W. R., 30). A zamindar brought to a judicial sale an under-tenure in execution of three *ex parte* decrees, obtained by him for arrears of rent thereof, under Act X of 1859, for different periods. The property was held by three Hindu brothers in joint possession. The zamindar purchased it at the sale. At the instance of the zamindar, execution had been issued against only one of the brothers. Another of them, referring to this, afterwards disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was, that the decrees had not, each and all of them, been against each and all of the three brothers,

and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with proper notices under Act VIII of 1865, and separate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made. *Held* by the Privy Council that the sale was a valid one, and operated to transfer the tenure to the purchaser (*Taralall Singh* v. *Sarobar Sing*, I. L. R., 27 Cal., 407).

Fraud.

To set aside a sale on the ground of fraud, it must be proved that the decree and the sale were fraudulent, and that the purchaser was a party to the fraud. The plaintiff purchased the rights and interests of one Gopaul Paul in a certain tenure, in execution of a Civil Court decree against him, on two dates. The plaintiff stated that he got possession and let out the lands to Gopaul Paul, that he (the plaintiff) paid rents to the *patnidar* (Watson & Co.), but that, notwithstanding such payments, Watson & Co. sued Gopal Paul for rent, obtained an *ex parte* decree and sold the tenure under Act VIII of 1865, upon which the defendant became the purchaser. The plaintiff sued to obtain possession of the tenure and to set aside the sale. *Held* that before the defendant's purchase of the tenure under Act VIII of 1865, which conveyed to him the tenure free of incumbrances, can be set aside, it must be shown that the decree and sale were fraudulent, and that the purchaser, defendant, was a party to that fraud, or had notice of that fraud (*Damodar Roy* v. *Nimanund Chuckerbutty*, 15 W. R., 365).

Appeal to the Civil Court.

Appeal.—Section 151, Act X of 1859, bars a regular suit to set aside a sale in execution of a decree for arrears of rent. No appeal lies from an order of a Collector passed after decree and relating to the execution thereof (*Rutton Moni* v. *Kali Kishen*, W. R., spl. No., 147). The purchaser of a tenure at an auction-sale, in execution of a Civil Court decree, offered to pay in certain arrears of rent, on account of which the tenure was at that time attached and about to be sold under a decree in a suit under Act X of 1859. The Assistant Collector refused to receive payment, and the tenure was again sold under Act VIII of 1865 (B. C.) The plaintiff then sued in the Civil Court to recover the tenure. *Held* that "under Act VIII, 1865 (B. C.), the plaintiff's remedy was by appeal to the Collector, Commissioner, and the Board of Revenue. The law having pointed out his remedy, the plaintiff should have acted as the law directs, if he was injured by the orders of the Assistant Collector. As he has failed to do so, and the sale has taken place, the precedent of the Full Bench (5 W. R., 20), applies to the case." (*Henry Buckland* v. *Ashoo Chowdhrain*, 9 W. R., 326). In *Nogendro Chunder Ghose and another* v. *Munsruff Bibi* (15 W. R., 17), however, it was *held* that the law does not lay down that the plaintiff must appeal to the Collector, and that this step by the plaintiff is a condition precedent to his having recourse to the Civil Court for redress under s. 13, Act VIII of 1865. An appeal has been provided by law in order that parties injured may resort to it for invalidating the sale; but it certainly does not say that the parties cannot come to the Civil Court to set aside the sale, unless there was previously an appeal to the Revenue-authorities. See also *Tekaet Bhao Narain* v. *The Court of Wards* (15 W. R., 58), where it was *held* that, where circumstances indicate not merely an irregularity, but an irregularity brought about by

the contrivance of the decree-holder, the Civil Court has jurisdiction to set aside the sale. When the tenure of a tenant admittedly in possession is sold under s. 105, Act X of 1859, he has no right to sue for the reversal of the sale, but when a party alleges that he is the tenant, and that the person, against whom the Act X suit was brought, was not the tenant in possession, he has a right to bring his action in the Civil Court to set aside the sale alleged to have been procured by fraud or to restrain the defendants from availing themselves of rights acquired by such sale (*Ganga* v. *Dam Ram Naryan*, 7 W. R., F. B., 183).

To the Board.

Observe that this section makes no mention of an appeal to the Board. A *patni* tenure was sold, in execution of a rent-decree, under the provisions of this Act. Against this sale an appeal was made to the Commissioner, who set it aside, on the ground that the sale was advertised to be held in one place, but was actually held in another. On the case coming up to the Board, on appeal, they *held* that they had no jurisdiction to interfere with the Commissioner's order, but, as the subject of Regulation VIII of 1819 is one which falls within the scope of their administration generally, they expressed their concurrence with the view, taken by the Commissioner, that the irregularity in the notice should have been sufficient to prevent the sale of the property under the *patni* procedure. (Board's Miscellaneous Proceedings of 21st September, 1895, No. 397, Collection 7, File 241 of 1895).

Board's Proceedings.

To the Commissioner.

Observe also that no appeal lies to a Commissioner under this section against sales held (without decree obtained) under the summary procedure of Regulation VIII of 1819. A Commissioner of a Division urged that it would be inconvenient and unjust, were there no appeal to the Commissioner from any irregular or illegal act done professedly under Regulation VIII of 1819. He was of opinion that this section gave the Commissioner power to interfere, on appeal made to him on the ground of irrelevancy of the law, with any original proceedings of a Collector under the Act. The Board ruled that this section did not apply to appeals in *patni* sales. It did not appear to them that, under this Act, any such appeal could be heard on any ground whatever. They, however, held that it was the duty of the local revenue-authorities to notice every irregularity arising from want of jurisdiction in the proceedings of their subordinates. Such notice would in some cases obviate injury, while in others it would not; but, in the latter class of cases, it would indicate to the injured parties the advisability of applying for redress to the Civil Court, which alone can right them effectually so long as the law remains unaltered.—(Board's Miscellaneous Proceedings of May, 1867, No. 333).

Board's Proceedings.

Power of revision.

14. No appeal as of right shall lie from any order passed in appeal under this Act; but a Commissioner, in any case in which an appeal has been heard by a Collector, and the Board of Revenue, in any case in which an appeal has been heard by the Commissioner, may call for the record at any time within three months from the date of the order passed in appeal, and pass thereon such orders as they may think proper.

Notes.

The Board have revisional powers.

Revision.—Although, as we have seen, no appeal lies to the Board under s. 13 of this Act, this section gives revisional powers to that body. It should be noticed, however, that these powers apply only to sales of under-tenures after decree obtained. A Commissioner set aside the sale of certain under-tenures in execution of a decree, on the ground that three of the five lots sold were not in arrears, though the *jama* of the five lots were the same as that for which the sale took place. The law only allows lands in arrears to be sold. *Held* by the Board, on appeal, that the Commissioner had power to upset the sale, and the reason given by him was valid. They, however, under the following section, supplemented the Commissioner's order by directing that the purchaser should receive back his purchase-money with interest at the rate of 12 per cent. payable by the respondent.—(Board's Miscellaneous Proceedings of 6th August, 1892, Collection 7, File 303 of 1892).

Board's Proceedings.

The sale of a tenure, in execution of a decree under this Act, was postponed by a Collector on the representation of one of the debtors that, if he failed to pay up the arrears due within the time of postponement, the sale was to be held. But no fresh notice was published. The tenure was afterwards sold, as the arrears had not been paid up. The sale-proceedings of the Collector was upheld by the Commissioner on appeal. Against this order of the Commissioner an appeal was preferred to the Board, who *held* that, on the postponement, it was incumbent on the Collector to issue a fresh notice, and that the failure to do so vitiated the sale-proceedings. They accordingly set the sale aside.—(Board's Miscellaneous Proceedings of 26th July, 1890, No. 59, Collection 7, File 130 of 1890).

Purchaser to recover purchase-money in such manner as appellate or revising authority may direct, if sale be set aside.

15. If any sale of an under-tenure shall, under either of the two preceding sections, be set aside, the purchaser shall be entitled to receive back the purchase-money with or without interest and in such manner as the appellate or revising authority may in each instance direct. Any order for the recovery of the purchase-money or interest, passed by such appellate or revising authority as aforesaid, may be enforced by the process in force under decrees for the recovery of arrears of rent.

Purchaser to acquire the under-tenure, with certain exceptions, free of encumbrances.

16. The purchaser of an under-tenure sold under this Act shall acquire it free of all encumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives, or assignees, unless the right of making such encumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees: Provided that nothing herein contained shall be held to entitle the purchaser to eject *khudkhast* raiyats or resident and hereditary cultivators, nor to cancel *bonâ-fide* engagements made with such class of raiyats or cultivators

aforesaid by the late incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor. Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to sale.

Notes.

Observe the difference between the language of s. 11 of Regulation VIII of 1819 and that of this section. The former speaks of incumbrances and leases, while the latter speaks of incumbrances only.

Object of the section.—Clause 7, sec. 15 of Regulation VII of 1799, provided for the sale of a dependent *taluk* or any other tenure, which, by the title-deeds or established usage of the country, was transferable by sale or otherwise. Section 15 of Regulation VII of 1799 did not, however, in express terms say whether the *taluk* or tenure was to be sold free from, or subject to, incumbrances which might have been created by the former holder. Clause 1 sec. 11 of Regulation VIII of 1819, provided that any *taluk* or saleable under-tenure, sold under the rules of that Regulation, was sold free of all incumbrances that might have accrued upon it by the act of the defaulting proprietor, unless the right of making such incumbrances should have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the *taluk* might have been held. Clause 3 of the same section protected *khudkast* raiyats and all *bonâ-fide* engagements at fair rents made with such tenants by the late incumbent or his representative. But it was not at that time expressly stated whether a sale of a tenure of the nature defined in sec. 8, Reg. VIII of 1819, if sold by any other process than that provided by clauses 2 and 3 of that section, was sold free of incumbrances created by the former proprietor or not, and consequently Regulation I of 1820 was passed to clear up any doubt on that subject. It provided that, whenever a sale of any of the tenures of the nature described in sec. 8 of Regulation VIII of 1819 took place, whether the sale was made under the provisions of that section or under the summary process authorized by the general Regulations, the sale was subject to sec. 11, and was, consequently, free of all incumbrances except those referred to in clause 3, and, amongst others, the tenure of cultivating raiyats, who had engagements entered into with them by the former proprietor at rents, which were as high as were demandable at the time when the engagements were entered into. Still the law, which rendered the sale free from incumbrances, was confined to tenures of the nature defined in sec. 8, Regulation VIII of 1819. This was the state of the law when Act X of 1859 was passed, and it was enacted by section 105 that "if the decree be for an arrear of rent due in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure, may thereupon be brought to sale in execution of the decree, according to the

Object.

rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force." That section in effect incorporated the provisions of sec. 15, Regulation VII of 1799, and secs. 8 and 11 of Regulation VIII of 1819; and, by incorporating these provisions, it substantially enacted that all tenures of the description mentioned in sec. 8, Regulation VIII of 1819, were to be sold free from incumbrances, according to the stipulation of sec. 11 of that Regulation. There was, however, no law in force by which tenures other than those defined in sec. 8 of Regulation VIII of 1819, that is, tenures, which were transferable by the custom of the country, could be sold free from incumbrances. The omission was supplied by Act VIII of 1865, the 16th section of which enacted that all tenures, sold under the provisions of that section, were to be sold free from all incumbrances, but subject to the proviso in that section which is in the same words as that contained in clause 3, sec. 11, Regulation VIII of 1819. (*Shahaboodeen* v. *Fatteh Ali*, 7 W. R., 260, F. B.; B. L. R., Sup. Vol., 646.)

Incumbrances only voidable.

Incumbrances are not void but voidable.—See notes under s. 11 of Regulation VIII of 1819, *ante*. The language of sec. 16, Act VIII of 1865, means that, at the time when the purchaser acquires the tenure, all under-tenures, created by the former holder of the tenure, are *ipso facto* avoided by the sale; and that he and those claiming under him are, by Art. 120 of the Limitation Act, entitled to bring their suit for the purpose of realizing the subject-matter of those under-tenures within 12 years from the date of the auction sale (*Annoda Charan Biswas* v. *Mathura Nath Dass Biswas*, I. L. R., 4 Cal., 860). This decision has, however, been overruled in the case of *Titu Bibi* v. *Mohesh Chunder Bagchi* (I. L. R., 9 Cal., 683; 12 C. L. R., 304), where it was *held* that under-tenures are not *ipso facto* avoided by the sale, but are voidable only at the option of the purchaser.

Purchaser can avoid all incumbrances.

Avoidance of incumbrances.—See notes under s. 11, Regulation VIII of 1819, *ante*. The purchaser of a tenure sold for arrears of rent acquires the tenures free from all incumbrances and under-tenures created by the defaulter (*Jan Ali* v. *Safuna*, 6 W. R., Act X, 6). If a piece of land constituting a tenure is sold without the consent of the zamindar, the purchaser can only be treated as holding a rent-free tenure, subject to that of the original tenant, such rent-free holding being an incumbrance, which can be avoided by the purchaser when the tenure itself is sold (*Shib Dass* v. *Bama Dass*, 15 W. R., 360).

Lakhiraj.

The auction-purchaser of an under-tenure sold under this Act acquires it free from any *lakhiraj* incumbrance created by the previous holder, if the latter had no authority to create such an incumbrance. (*Issur Chandra Chukerbutty* v. *Bistoo Chunder Chuckerbutty*, 12 W. R., 32). If the holder of an under-tenure allows his tenant to occupy the land rent-free for more than 12 years, the interest thus created in the latter is an incumbrance upon the under-tenure as much within the provision of Act VIII (B. C.) of 1865, s. 16, as if the holder had made a rent-free grant, or given a nominal lease (*Mahamad Askur* v. *Mahamad Wasuk*, 22 W. R., 413).

Howla or other intermediate holding.

An auction-purchaser, at a sale under Act VIII of 1865, has a right to get rid of an intermediate holding such as a *howla*, so far as to substitute himself for the *howladar*, who is not, any more than a *talookdar* himself, the

actual occupier of the land, but is only a person receiving in respect of the land a proportionate share of rent. (*Mohiooddeen Mahomed* v. *Ram Kishore Koondoo*, 22 W. R., 311). In a suit by a purchaser claiming in virtue of Act VIII of 1865, s. 16, and seeking to eject defendants from land they have been holding in succession from their father as cultivators, and which they allege to have been holding under a *howla pottah*, it is open to the defendants to prove that they are *howladars*, although they fail to prove the *howla pottah* which they set up (*Tilak Chunder Kopalee* v. *Rajah Satyanund Ghosal*, 20 W. R., 315).

Shikmi tenure.

Where a *shikmi* tenure was sold under Bengal Act VIII of 1865, and the *shikmidar* was found to be the under-tenant of the zamindar, the *shikmi pottah* not giving the privilege of making incumbrances, the purchaser was held entitled under s. 16 to receive the tenure free of all incumbrances, *e.g.*, the incumbrance of a *jamai* tenure of a person who was not a *khudkast* raiyat (*Huru Narayan* v. *Wooma Charan*, 19 W. R., 169).

Purchase by a sharer.

Observe, however, that s. 16 does not apply to the purchaser of a share of a tenure. "A purchaser who applies to enforce the stringent provisions of s. 16 of Act VIII of 1865 is bound to show that he has acquired the right given to a purchaser by that section. That right is given to the purchaser of an entire under-tenure, and not to the purchaser of the share of an under-tenure. We have no power to extend the right, and a reference to the provisions of the Rent law, both Act X of 1859 and the present law, Act VIII (B. C.) of 1869, will show that the right has been carefully limited by the Legislature, and that a sharer with a limited interest could not, and cannot, sell the whole tenure, under Act VIII of 1865, for arrears recoverable under either of those Acts." (*Sham Chand Mitter* v. *Juggut Chunder Sircar*, 22 W. R., 541). In *Huro Sundari Dassya* v. *Kishen Monee Chowdhurani* (13 W. R., 257), *S*, *N* and *R* were possessed of a certain *mahal*. A *kut kobalah* of one-third of this property was granted to one *J* who obtained a decree after foreclosure, and got possession. Two-thirds of the *mahal* were sublet by *S* and *N* to one Komal Lochan in *patni*. In execution of a decree against Komal Lochan one-fourth of his tenure was sold to one Kalikant and three-fourths were sold to Chundernath and Haronath, who were thus in possession of three-fourths of two-thirds, equal to half or 8-annas of the *mahal* in dispute. Chundernath's share, 4 annas, was purchased by the plaintiff, but the plaintiff was dispossessed by the defendants who had purchased the right, title and interest of *N* in the property in a sale, under Act VIII of 1865, in execution of a decree obtained by the zamindars for rent against *N*. *Held* that the reason why no distinction is made in s. 16 of Act VIII of 1865 between the purchaser of the whole and a part of the *mahal* is that the section in question makes no mention whatever, and appears, therefore, not to apply to sales of portions of tenures. Norman, C. J., remarked: "The purchaser of a portion or fractional share in an under tenure is not the purchaser of the under-tenure any more than the purchaser of a house in a village is a purchaser of the village....We think that, by the sale of the rights and interests of Nidan Chunder (*N*), the purchaser Kishen Monee Chowdhurani acquired only such rights as Nidan Chunder possessed at the time of the sale, and that, therefore, she took subject to the rights of the persons now interested under the *patni* granted by him to Komal

Lochan." The purchaser of a partnership in a tenure, in other words, of a shareholder's rights, acquires no right to retain possession against a person who buys the tenure itself when sold for arrears under Act VIII of 1865 (*Huro Mohan Giri* v. *Durga Charan Giri*, 15 W. R., 319).

Incumbrances created prior to the creation of the tenure.

Protected Interests.—See notes under s. 11, Regulation VIII of 1819, *ante*. Incumbrances existing from a period prior to the creation of the tenure cannot be set aside, s. 16 referring to incumbrances created subsequently (*Bhola Nath Ghosal* v. *Kedar Nath Bannerjee*, 19 W. R., 106).

Incumbrances created with the sanction of the *zamindar*.

Shareholders with a tenant are primarily liable with him to the zamindar for the rent of the tenure, unless the zamindar comes to a separate agreement with them for the payment of their share. Where parties hold under or through the tenant, the zamindar is not bound to recognize their holding as a separate holding; and his taking the rent of the whole tenure, or a part of it, from their hands, does not of itself amount to such a recognition as is contemplated in s. 16, Act VIII (B. C.) of 1865 (*Sreenath Chuckerbutty* v. *Sreemanto Laskar & others*, 10 W. R., 467). In a suit by a purchaser at a sale, under Act VIII of 1865, to get rid of an under-tenure set up by defendants, where, in reliance upon the latter clause of s. 16, it was urged that the *pottah* under which the defendants held was created by the late holder with the express sanction of the zamindar, it was *held* that, under the strict provisions of the section, no sanction of the zamindar would avail, unless the right was vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it or his representatives (*Eshan Chunder Mozumdar* v. *Hurrish Chandra Ghose*, 21 W. R., 137).

Khudkast raiyats or resident and hereditary cultivators.

The expression "*khudkhast raiyat*", as used in s. 16, Act VIII (B.C.) of 1865, means "resident and hereditary cultivators" (*Koontee Debee* v. *Hridoy Nath Durreepa*, 16 W. R., 206). The mere fact of a *raiyat* residing in one *mouzah* and the land being situated in another does not preclude him from being treated as a resident cultivator within the meaning of s. 16, Act VIII of 1865. It may be that the two *mouzahs* are situate within the same estate, and they may also be closely adjoining to each other. (*Nobo Kishur Biswas* v. *Jadub Chunder Sircar*, 20 W. R., 426). In *Nil Madhub Karmakar* v. *Shiboo Paul* (13 W. R., 410), an auction-purchaser of an under-tenure at a sale under Act VIII of 1865, finding an incumbrance thereon created by his predecessor in the shape of a *mokurrari* lease, sued the lessee to recover *khas* possession of the land covered by the *mokurruri*. The defendant pleaded a right of occupancy founded on his having cultivated the land for more than 12 years. *Held* that the defendant was protected from ejectment by s. 6, Act X of 1859, and that, even if the lease were avoided under s. 16, Act VIII of 1865, ejectment does not necessarily follow thereby, and therefore Hobhouse, J., observed:—"If the suit had been one on the part of the plaintiff to declare that he was free from the incumbrance made by the late holder of the tenure, it is most likely that we should have held that the suit was a good one, and that we should have given the relief asked for, because the incumbrance in question was undoubtedly an incumbrance which had accrued by the act of the former holder, and which was not protected by any especial right given under special agreement to make such incumbrance. But

the defendant, in this instance, does not rely solely upon the incumbrance, if he indeed relies upon it at all. He says he cannot be ejected because he has a right of occupancy—a right expressly given to him by the provisions of Act X of 1859. The incumbrance, to which s. 16, Act VIII of 1865, refers, is not the *person* but the *thing*. The lease in this instance might possibly be avoided; but it does not follow that the man who holds that lease must necessarily thereby and therefore be ejected. The law does not say so, and on the contrary the provisions of Act X of 1859, on which defendant relies, protect a person who, like the defendant, has a right of occupancy." A certain *chur* having been converted into two estates paying Government revenue, the plaintiff became the purchaser of one of these estates at a sale for arrears of revenue and of a *howla* lease of the other at an auction-sale for arrears of rent, and brought a suit, in virtue of s. 37 of Act XI of 1859 and s. 16 Act VIII (B. C.) of 1865, to avoid the tenure of the defendants, who held, in *shikmi talukdari* and *howladari* tenure, holdings appertaining to both the estates. The defendants admitted the alleged nature of the holdings, but claimed exemption from eviction on the ground that one of their ancestors, more than 12 years before, had cleared and cultivated the land and built a house thereon, and that, since his death, they themselves had continued to cultivate the land and reside upon it. The lower Court having found that the defendants were hereditary and resident cultivators, it was *held* that the defendants were entitled to the benefit of the proviso in s. 16, the words of that proviso being wide enough to embrace every resident and hereditary cultivator irrespective of his denomination (*Ahsanollah* v. *Shamsere Ali*, 4 C. L. R., 165). In *Eman Ali Mistri* v. *Ator Ali Khan* (22 W. R., 133), where the question was whether the defendant's right of occupancy had been defeated by the title which the plaintiff had acquired, it was *held* that the right of occupancy is not avoided by the operation of s. 16, Act VIII of 1865. Where the rights and interests only of a judgment-debtor are sold in execution under Act VIII of 1865, the tenure itself does not pass, much less does it pass free from all encumbrances; and the purchaser is not entitled to eject tenants who have been occupying and cultivating the land for more than 12 years (*Rajkishore Mukherjee* v. *Dusruth Sootradhar*, 15 W. R., 234). But subordinate tenures not created in good faith are not protected when the tenure itself is sold for arrears of rent (*Durgacharan* v. *Ananda Moyee*, 3 W. R., 127). In a case between the purchaser of a *patni taluk* at an auction-sale under Act VIII (B. C.) of 1865 and a party claiming as *dar-ijaradar*, the point to be decided is whether the latter was *bonâ fide* in possession by collecting rent. If he was, the question of the avoidance or voidability of the tenure is not one which can be disposed of in the Collector's Court (*Ganga Ram* v. *Ram Kamal*, 13 W. R., 68).

Brick-built house.

A brick built house erected on land comprised in the holding cannot be considered as "an incumbrance" on the tenure within the meaning of that word in s. 16, Act VIII of 1865. If the land had been sold for arrears of Government revenue, the owner of a house built on the land might have been entitled, as against the auction-purchaser, to reside in, and enjoy, the house, paying an equitable ground-rent for the site to such pur-

chaser, and that, whether the house were built by a person holding under a lease granted by the former proprietor (Act I of 1845, ss. 3, 26 and 27; Act XI of 1859, ss. 3 and 7), or even by the ex-proprietor himself. It is not easy to see why the purchaser of a tenure at a sale for arrears of rent should be treated as having a right greater than that of a purchaser at a sale for arrears of Government revenue. A landlord may object to the erection of a brick-built house on land let out for cultivation, and obtain an order restraining his *raiyat* for thus altering the character of the tenure; but, if he remains passive and allows the house to be built, he cannot afterwards be heard to say that the tenant had done any wrong. Should the tenancy determine, the landlord would be the owner of the soil, the tenant of the house. The purchaser of a tenure at a sale for arrears of rent only takes such rights as the landlord himself could have exercised, if he had re-entered and resumed possession of the property (*Shib Dass Bannerjee* v. *Bamun Dass Mukherjee*, 15 W. R., 360).

Auction-purchaser can not avoid incumbrances without notice.

Notice.—An auction-purchaser under Act VIII of 1865 is not at liberty without notice of his intention to cancel a pre-existing tenure, or to avoid any incumbrance (*Govind* v. *Alimoodeen*, 11 W. R., 160). Without any act on the part of the auction-purchaser or any notice of an intention to cancel a pre-existing under-tenure, the tenure does not fall to the ground by the mere fact of the sale (*Raja Satto Saran* v. *Mohesh Chunder*, 11 W. R., 10).

Effect of fraud.

Fraud.—If a lessor enters into an agreement with another person to get rid of his lessee by means of a fictitious sale for arrears of rent, and to share the profits of the transaction, that is a fraud against the lessee. The person, with whom such agreement is made, must not be considered as having the rights of an auction-purchaser under Act VIII of 1865, but only those of a purchaser (*Sree Nath Ghose* v. *Horonath Dutt Chowdhry*, 18 W. R., 240). A suit by an auction-purchaser to obtain *khas* possession of an under-tenure, which had been sold under Act VIII of 1865, was dismissed on the ground that the suit, in which the zamindar had obtained the decree, was a fraudulent one, and that the purchaser knew that it had been against the wrong party. (*Nobin Chunder* v. *Nobin Chunder*, 22 W. R., 46).

Onus.

Onus.—At a sale held under Bengal Act VIII of 1865, the defendant purchased a *shikmi* tenure and obtained possession thereof. Subsequently, he ousted the plaintiff from certain lands, who brought a suit for recovery of possession thereof on the ground that the property in dispute was a *lakheraj* tenure created by the Rajah of Tipperah, and that he was the owner thereof partly by purchase and partly by inheritance. The Lower Appellate Court found as a fact that the late *shikmeedar*, and not the Raja, had granted the lands in dispute as *bramattar* in favour of the person through whom the plaintiff claimed. It, however, passed a decree in favour of the plaintiff, as he had been unlawfully dispossessed. *Held* that under s. 16, Act VIII of 1865, the encumbrances created by the former holder were voidable by the auction-purchaser, and that it was upon the plaintiff to show that the former holder could create such a right. (*Iswar Chunder* v. *Bistu Chunder*, 3 B. L. R., App. 79).

Estoppel.

Estoppel.—Where a purchaser of a tenure in a sale, held under the provisions of Act VIII of 1865 (B. C.), sued the person in possession for rent

and obtained an *ex parte* decree, and then brought a suit for enhancement of rent to which the defendant pleaded that he was entitled to hold the land under a *mokurrari potta*, upon which the plaintiff withdrew his suit and brought the present suit for ejectment: *Held* that the plaintiff was not estopped from bringing the suit by reason of his having brought a rent-suit against the defendant. Under s. 16 of the Act he is allowed to avoid incumbrances, and if the defendant would not accept the position of the tenant offered to him and pay a reasonable rent, the plaintiff is entitled to eject him. No previous notice to quit need be given for the maintainability of a suit of this nature (*Arsali Sadagar* v. *Ram Satya Bhakat*, 7 C. L. J., 191).

Limitation: 12 years.

Limitation.—The purchaser and those claiming under him are, by Art. 120, schedule II of Act IX of 1871, entitled to bring a suit for the purpose of realizing the subject-matter of under-tenures, created by former holders, within 12 years from the time of the sale (*Annoda* v. *Mathuranath*, 4 C. L. R., 7; I. L. R., 4 Cal., 860). Under Art. 121, sch. II of Act XV of 1877, the period of limitation is 12 years from the time when the sale becomes final and conclusive. (See *Harek Chand* v. *Bejoy Chand*, 2 C. L. J., 87; 9 C. W. N., 795).

Zamindar how to proceed if purchaser does not register.

17. The purchaser of an under-tenure sold under this Act shall apply to the zamindar or other land-holder, within fifteen days from the day of sale, to have his name registered in the zamindar's or other landholder's books as the purchaser, and shall execute a *kabuliyat* on the same terms and conditions on which the under-tenure was held by the defaulter; and, if such application be not made within fifteen days, it shall be lawful for the zamindar or other landholder to sue the said purchaser under the provisions of clause 1 of section 23 of Act X of 1859.

Notes.

See notes under ss. 5, 6 & 7, Regulation VIII of 1819.

Indemnity.

18. The provisions of section 3 shall be applicable to all sales held under Regulation VIII of 1819 previously to the passing of this Act; and no suit shall lie in respect of such sales on the plea of want of jurisdiction of the Officer by whom they were conducted.

Schedule referred to in Section 11.

I certify that *A. B.* has purchased, under Act VIII of 1865, the under-tenure (*as specified in the notice of sale*), and that his purchase took effect on the day of (*being the day after that fixed for the last day of payment.*)

(Signed) *C. D. Collector.*

INDEX.

A

ABATEMENT—
of patni rent, s. 52 of B. T. Act applies to, 24.
of rent where portion of land included in patni is resumed as chakeran, 30.
————on the ground of misrepresentation of assets, 31.
————cases in which a patnidar cannot claim, 31.
————how claimed, 32.
————amount to be deducted how ascertained, 32.
————*res judicata* in cases of claims for, 33.
————on the finding in a previous rent-suit, 75.
————*See* RENT.
of patni jama where part of patni acquired by Government, 73.

ABWAB—
on tenant over and above the actual rent is not rent, 18.
stipulation for payment of, in a permanent mokurari lease is valid, 18, 75.
stipulation for payment of, in a patni or a darpatni lease is valid, 19.
extra amount as zamindari *salami*, etc., is an illegal cess or, 19.
collection-charge tenants agree to pay is not, 19.
thakurbari cess on patni jama held not to be an, 19.
chowkidari taxes are not, 20.

ACCOUNT—
entry in an, when not amounting to consent in writing on landlord's behalf, 58.

ACCRETION—
from recess of river or sea, increase by, 27.

ACTS REFERRED TO—
Of G.-G. in Council—
1835, VIII, s. 2, p. 167.
1845, I, ss. 3, 26, 27, p. 194.
1850, XXV, pp. 110, 169 ; (s. 1), p. 109.
,, XXXIII, s. 1, pp. 88, 91.
1853, VI, pp. 170—173.
1859, VIII, s. 269, p. 76.
,, X, pp. 12, 29, 48, 119, 153 ; (s. 1), p. 165 ; (s. 10), p. 24 ; (s. 18), pp. 28, 31 ; (s. 23), p. 31 ; (s. 30), p. 32 ; (s. 105), pp. 121, 175, 176, 177.
,, XI, p. 110 ; (s. 37), pp. 113, 115, 118 ; (s. 52), p. 117.
1861, X, pp. 61, 110.
,, XXIII, s. 27, p. 23.
1862, VI, p. 119.
1864, XVI, p. 46.
1865, XI, s. 6, p. 134.
1868, VII, s. 12, p. 113.
1869, VIII, s. 46, p. 23.
1870, VI, s. 48, p. 38.
,, XIV, p. 169.

ACTS REFERRED TO—
Of G.-G. in Council—contd.
1871, IX, Art. 120, p. 195.
1872, IX, (s. 23), p. 109 ; (s. 69), pp. 134, 138, 139 ; (s. 70), p. 134.
1873, XII, p. 173.
,, XVII, p. 89.
1874, XIV, s. 3, pp. 169, 171.
,, XVI, (s. 1), pp. 88, 109.
1877, XV, Art. 12 (*d*), p. 152 ; (Art. 29), p. 163 ; (Art. 61), p. 139 ; (Art. 96), p. 24 ; (Art. 120), p. 190 ; (Art. 121), pp. 115, 122, 124, 195 ; (Art. 133), p. 44 ; (Art. 134), p. 10 ; (Art. 142), pp. 43, 44 ; (Art. 144), pp. 43, 44, 124.
1881, XII, p. 180.
1882, IV, (s. 2), p. 62 ; (s. 73), p. 157 ; (s. 108), p. 66 ; (s. 111), p. 62.
,, XIV, (s. 19), p. 146 ; (ss. 293, 306, 308) p. 184 ; (s. 586), p. 21.
1885, VIII, p. 28 ; (Ch. XIV), pp. 88, 115, 118 ; s. 3 (5), p. 14 ; (s. 11), pp. 53, 177 ; (s. 13) pp. 47, 48, 49, 72, 80, 81 ; (s. 15), pp. 46, 47, 81 ; (s. 16). pp. 46, 47, 81 ; (s. 17), pp. 53, 54, 56 ; (s. 18), p. 177 ; (s. 52), pp. 24, 32, 33 ; (s. 61), p. 23 ; (s. 65), pp. 66, 67, 132, 158 ; (s. 67). pp. 74, 75 ; (s. 74), pp. 18, 19 ; (s. 88) pp. 53, 54, 56, 57, 58 ; (ss. 90, 91). p. 45 ; (s. 159), p. 113 ; (s. 160), pp. 119, 121 ; (s. 161) pp. 113, 115, 130 ; (ss. 164, 165), pp. 113, 117 ; (s. 167), pp. 118, 122 ; (s. 169), pp. 67, 157, 165 ; (s. 170), p. 79 ; (s. 171), pp. 115, 127, 129, 130 ; (s. 172). p. 127 ; (s. 178) pp. 74, 75 ; (s. 179), pp. 29, 74, 75 ; (s. 184) pp. 122, 125 ; (s. 185), p. 122 ; (s. 188), p. 28 ; (s. 195), pp. 24, 46, 47, 48, 72, 80, 81.
1903, I, pp. 109, 136, 174.
Of L.-G. in Council—
1862, VI, p. 45 ; (s. 9). p. 76 ; (s. 12) pp. 21, 22 ; (s. 15). p. 76.
1865, VIII, pp. 8, 119, 173, 174—195 ; (s. 2), p. 156 ; (s. 3) p. 91 ; (s. 6), p. 127 ; (ss. 8, 9), p. 109 ; (s. 11), pp. 118, 158 ; (s. 13), p. 146 (s. 17). p. 78.
1869, VIII, p. 45 ; (s. 38). p. 45 ; (s. 59), p. 159 ; (s. 62), p. 128.
1870, VI, pp. 42, 43.
,, VII, pp. 39, 90 ; (s. 38), p. 51 ; (s. 78), pp. 51, 127.
1879, IX, s. 38, p. 127.
1880, IX, s. 41, p. 19.
ADVERSE POSSESSION—
is an incumbrance, 115.
limitation in case of, 123.
against auction-purchaser, 123.
when patni is surrendered, 124.
ADVERTISEMENT—
setting forth description and calling upon intending purchaser is an implied warranty of title, 33.
AGRICULTURAL LEASE—
patni lease is not an, 13.
ALIENATION—
of Hindu widow's interest valid with consent of reversioner, 6.
by Hindu widow, limitation in case of, 7.
by Muhammadan widow, 9.
application of s. 108 of Transfer of Property Act to permanent, 66.
of patni taluk, zamindar's right to demand fee upon, 78.
AMALDASTAK—
grant of, to patnidar, 85.
ANNULMENT—
of incumbrance by purchaser, 113, 114.
ANTECEDENT BALANCES.—*See* BALANCES.

APPEAL—
where zamindar refuses sanction to transfer, 78.
against sale under Ben. Act VIII of 1865, jurisdiction of, 185-187.
grounds of, to invalidate a sale, 185, 187.
revision of such, 187.
APPLICATION—
for registration of name, limitation as to, 84.
for sale of tenure analogous to remedy by distress, proceedings on, 88, 89.
APPORTIONMENT—
of compensation amongst various persons interested in property, 34-38.
of rent by Civil Court, 55.
ARRANGEMENTS—
for leasing of lands in taluk by the proprietors, 1.
limitation as to such, by Reg. XLIV of 1793, 1.
ARREARS—
of rent, patni tenures declared not voidable for, 51.
of rent, patni tenures are liable to sale for, 66.
——, *See* RENT.
ASSIGNMENT—
money payable under an, to a third person is rent, 15.
of rent on increase of land by encroachment, etc., rate of, 27.
ATTACHMENT—
of patni taluk by zamindar if security not tendered in time, 84, 85.
of patni taluk by zamindar, effect of, 85.
AUCTION-PURCHASER—
adverse possession against, 123.
need not bring a fresh suit for his dues, 148.
may proceed to execution when decree is passed, 148.
AWARD—
review of, in summary suit, 144.
collector's power as to review of, 144.

B

BACK-RENT—
for additional area formed by encroachment, etc., 28.
BALANCES—
petition for sale should contain specification of, 92.
antecedent, are personal debts, 158.
——————, are not charges on the taluk sold, 151.
BENAMI-TRANSACTION—
creation of patni taluk by, 12.
BENGAL TENANCY ACT (VIII OF 1885)—
on patni tenure, effect of, 46, 47, 48.
See ACTS.
BID—
what is necessary to accept a, 108.
who can, at sale of patni taluk, 109, 110.
BONUS—
refund of, paid for patni taluk on failure of consideration, 33.
refund of, to former darpatnidar on cancellation of fresh darpatni lease granted to him by auction-purchaser, 76.
BOUNDARIES—
lease with defined, covers all lands more or less, 25.
BURDEN OF PROOF—
as to whether a land is lakhiraj, 45.
where defendant pleads a patni tenure, 45.

C

CAUSE OF ACTION—
once matured, subsequent occurrence of further damage does not originate a fresh cause, 34.

CERTIFICATE—
of payment of purchase-money is admissible in evidence without being registered, 155.
of publication to be obtained by peon, 101
value of having, of service of notice, 101.
of purchase when to be given to purchaser, 184.
of purchase, form of, 195.

"CERTIFICATE TO THE EFFECT"—
in s. 8, cl. 2 of Reg. VIII, 1819, meaning of, 101.

CESS—
interest and, petition for sale should include, 92.

CHAKERAN LAND—
abatement of rent where portion of land included in patni is resumed as, 30.
what are, 38.
right of zamindar and of patnidar to resume, 38.
whether patnidar entitled to resume, 39.
additional rent payable by patnidar when, settled with him, 40.
basis of calculation of additional rent of such, 40.
right to excess sale-proceeds of, sold for Government revenue, 41.
right of raiyat settled on resumed, as against patnidar, 41—43.
form of suit to recover possession of resumed, 43.
limitation in such cases, 43.

CHARGES—
on the estate, Road and Public Work Cesses are not, 20.
antecedent balances are not, on taluk sold, 158.
See FEES.

CHOWKIDARI CHAKERAN LANDS—*See* CHAKERAN LANDS.

CHOWKIDARI TAXES—
are not abwab, 20.
would not seem to come within definition of rent, 20.

CIVIL PROCEDURE CODE (Act XIV of 1882)—
See ACTS.

COLLECTION-CHARGE—
tenants agreeing to pay is not an abwab, 19.

COLLECTOR—
defined, 172, 176.

COLLECTORATE(S)—
conduct of sale of land when all in one, 171.
conduct of sale of land when in two or more, 171, 172.
definition of the term, 172.

COMPENSATION—
apportionment of, amongst various persons interested in property, 34—38.
in what proportion zamindar and patnidar are entitled to get, 35.
when patni land taken up for public purposes, partnidar entitled to, 34—38.
where patni land taken up by private party, 38.
for loss sustained by undertenant in consequence of sale, 162.
form of suit for such, 163.

CONSENT—
of landlord, relinquishment and surrender of patni tenure without, 71.
written to a partition when not necessary, 57.
———, *dakhilas* not amounting to, 57, 58.
in writing, entry in an account when not amounting to, 58.
of landlord, patni cannot be relinquished without, 70.
statutory lien cannot be created by, 130.

CONTRACT—
special, of Road and Public Works Cesses from patnidar, 19.
question to be considered in such, 20.
payment of *dák* cess depends upon, 21.
as to interest on arrears of rent is binding, 75.

CONTRACT ACT (Act XI of 1872)—*See* ACTS.

CONTRIBUTION—
when purchaser paying off rent-decree not entitled to, 67.
shareholder paying entire rent is entitled to, 138.
patnidar paying Govt. revenue is entitled to, 138.
when mortgagee of a share paying entire rent is entitled to, 139.
purchaser paying arrears accruing before date of sale is not entitled to, 139.
in a suit for, joint decree cannot be passed, 139.
limitation as to suit for, 139, 140.

CONVEYANCE—
of land, a conveyance of entire *solum* from surface down to centre, 64.
———, passes the entire estate, 64.

CO-OWNERS—
one of, may sue to set aside sale, 146.

CO-PATNIDAR—
suit for partition against, 62.

CO-SHARER(S)—
right of measurement by, in an undivided estate, 45.
equity between, 140.

COSTS—
whether sale may be stayed on refusal to pay, 142.

CREDITOR—
to refund his share of sale-proceeds if sale be set aside, 161.

CUSTOM—
as to transferability of occupancy-rights, 177—180.
evidence of such, 180.
onus of, 181.

D

DAK CESS—
what is, 21.
payment of, depends upon contract, 21.
is not recoverable as rent, 22.
suit for, is cognizable by Small Cause Court, 23.

DAKHILAS—
not amounting to written consent, 57, 58.

DAMAGE(S)—
cause of action once matured subsequent occurrence of further, does not originate a fresh cause, 34.
darpatnidar cannot claim, when in arrear, 164.

DARPATNI—
measurement of raiyat's holding in, by patnidar, 76.

DARPATNIDAR—
position of unregistered, 73.
ejectment of, 76, 77.
right of suit for possession by a holder under, 77.
cannot claim damages if in arrear, 164.

DARPATNI LEASE—*See* LEASE.

DARPATNI TALUK—
application of B. T. Act to, 81.

DARPATNI TENURE—
mere possession for 12 years not sufficient to create, 72.
does not necessarily lapse, where patni found to be *benami*, 72.
transfer of, 72, 73.

DATE—
of presentation of petition where both *Amli* and *Fasli* years are used, 91, 92.
when notice to be published, 104, 105.
of sale after due service of notice, 106.

DEATH—
of a registered patnidar, procedure in case of succession on the, 81.

DEBT(S)—
patni taluks are answerable for, 50.
personal, antecedent balances are, 158.

DECREE—
by co-sharer landlord is not a decree for rent, 69.
execution of, for consolidated rent of three tenures, 69.
sale of patni taluk in execution of, rules applicable to, 78.
joint, cannot be passed in a suit for contribution, 139.

DECRETAL AMOUNT—
payment of, where to be made and when, 183.

DEED—
of lease, parol evidence is admissible to explain the, 46.

DEFAULTER—
cannot bid, 109, 110.
who are included by the term, 109.
purchase by, only voidable, 110.
mortgagor of patni not a, 110.
tenure to be sold free of incumbrances by act of, 112.
limit of time for payment by, 128.
contesting zamindar's demands may apply for summary investigation, 135, 143.
when to receive surplus sale-proceeds, 165.

DEFAULTING PROPRIETOR—
meaning of, 117.

DEFICIENCY—
realization of, on re-sale, 110.
to be recovered by civil suit, 111.

DEMAND—
of the zamindar, who can lodge, 136—138.

DEPOSIT—
of rent in Court, 23.
effect of withdrawal of, by landlord, 23.
application of forfeited, 169.
to be made by purchaser, rate of, 183.
when to be forfeited, 183, 184.

DEPOSITOR—
under s. 171 of B. T. Act will be put in possession upon application, 129.
notice by, of his title must be given to tenants, 130.
may bring a regular suit to recover amount advanced, 130, 131.

DEPUTY COLLECTORATE—
defined, 172.

DILUVION—
abatement of rent on the ground of, 28.

DISTINCTION—
between "incumbrance" and "registered and notified incumbrance," 117.

DISTRESS—
proceeding on application for sale of tenure analogous to remedy by, 88, 89.

E

EFFECT—
of withdrawal of deposit by landlord, 23.
of defective service of notice of sale, 106.

EJECTMENT—
of darpatnidar, 76, 77.
validity of sale in a suit for, by purchaser, 152.

ELECTION—
to treat the lease as valid, acts which amount to an, 7.

ENCROACHMENT—
on landlord's land, 26.
on third person's land, 26.

ENCUMBRANCE—
tenure saleable free of, 88.
See INCUMBRANCE.

ENGAGEMENT—
with raiyats, exception in favour of *bonâ fide*, 113.

ENHANCEMENT—
of patni rent, s. 52 of B. T. Act applies to, 24.
of rent where lease with defined boundaries contains more land than is specified, 25.
of rent by joint landlords, suit for, 28.

EQUITY—
between co-sharers, 140.

ESTOPPEL—
as to ejectment by reason of purchaser's having brought a rent-suit, 195.

EVIDENCE—
certificate of payment of purchase-money is admissible in, without being registered, 155.

EXCHANGE OF LAND—
is an incumbrance, 115.

EXECUTION—
of patni kabuliyat, 12, 13.
auction-purchaser may proceed to, when decree is passed, 148.

EXECUTION OF RENT-DECREE—*See* REMEDY.

EXECUTION-SALE—
purchaser at, cannot recover from original patnidar amount deposited to stay sale, 138.

F

FEE(S)—
upon alienation of patni taluk, zamindar's right to demand, 78.
rate of, upon such alienation, 78.
not required for possession of patni taluk by purchaser, 78, 80.
for registration of names of auction-purchaser, courses open to compel payment of, 86.
of Mukhtear to be treated as charges in bringing patni to sale, 157.
of pleader when to be treated as charges in bringing patni to sale, 157, 158.
of Revenue Agent to be treated as charges in bringing patni to sale, 157.

FORFEITED DEPOSITS—*See* DEPOSIT.

FORFEITED DEPOSITS ACT (XXV OF 1850).—*See* ACTS.

FORFEITURE—
of earnest-money when made, 110.
need not be ordered immediately, 111.

FORM(S)—
to be observed in selling, 111, 112.
of suit for reversal of sale, 151.
of suit for compensation for loss sustained by under-tenant in consequence of sale, 163.

FRAUD—
by means of a fictitious sale for arrears of rent, effect of, 194.

FURTHER DAMAGE—*See* DAMAGE.

G

GRANT—
of patni by Hindu widow not void but voidable, 6, 7.

GRANTEE—
what are the requirements to ascertain the rights of, 65.

H

HEREDITARY CULTIVATOR—
ejectment of, 113.

HINDU WIDOW—
creation of patni taluk by, 5.
——————valid when legal necessity exists or estate benefits, 5.
, valid when reversioner consents, 6.
owner of her husband's property subject to certain restrictions, 5.
can make a valid alienation of her interest with consent of reversioner, 6,
grant of patni by, not void but voidable, 6, 7.
limitation in case of alienation by, 7, 8.

HOUSE—
brick-built, not to be considered as incumbrance, 193.

I

INCREASE—
by encroachment on landlord's land, 26.
——————on third person's land, 26.
by accretion from recess of river or sea, 27.
Reg. XI of 1825 as to, 27.
increased rent on such, 27.
rate of assessment on such, 27.
when tenant not liable to enhancement of rent for such, 28.
back rent of such, 28.

INCUMBRANCE(S)—
tenure to be sold free of, by act of defaulter, 112.
meaning of, 113.
annulment of, purchaser entitled to, 113, 114.
a lease is an, 114.
an under-tenure is an, 114.
instances of, 114.
kinds of, 114.
exchange of land is an, 115.
adverse possession is an, 115.
mortgage when not an, 115.
occupancy-right is an, 115.
non-occupancy-right is an, 115.
since creation of patni taluk not voidable, 117.
sale of a portion does not avoid, 118.
not voidable when several tenures are put up for sale in execution of one decree, 118.
distinction between, and registered and notified incumbrance, 117.
not void but voidable by purchaser, 118.
onus as regards, 122.
right to avoid, must be exercised within reasonable time, 122.
are not void but voidable, 190.
purchaser can avoid all, 190.
at a sale of *sikmi* tenure, 191.
created prior to the creation of tenure, 192.
created with sanction of zamindar, 192.
brick-built house not an, 193.
auction-purchaser cannot avoid, without notice, 194.

INDEPENDENT DEPUTY COLLECTOR—
defined, 172.
powers and jurisdiction of, 172.
publication of notice of sale by 172.
exercise of powers of, 172.

INJUNCTION—
on zamindar to give effect to transfer when granted, 78.

INSTALMENT—
payment of patni rent by, 23.

INTEREST—
of patni tenure of the second degree, 72.
of patni tenure of third or fourth degree, 72.
on arrears of rent is binding, contract as to, 75.
and cess, petition for sale should include, 92.
inferior, cannot be annulled before superior interest, 117.
upon purchase-money, purchaser is entitled to, 147.
when zamindar is liable to pay, upon purchase-money, 148.

INVESTIGATION—
defaulter contesting zamindar's demand may apply for summary, 135, 143.
scope of such, 143.

J

JURISDICTION—
for suit to set aside sale, 146.
procedure in case of doubt as to, 172.
powers and, of Independent Deputy Collector, 172.
of appeal under Ben. Act VIII of 1865, 185—187.

K

KABULIYAT—
creation of patni taluk by patnidar taking land not covered by, 11.
execution of patni, 12, 13.

KHUDKAST JOTES—
sale of, 178.

KHUDKAST RAIYAT—
ejectment of, 113.
meaning of, 119, 192.
cannot be evicted, 119.
distinction between, and *paikast* raiyat, 119.
power of purchaser to eject, 188.
how to acquire the under-tenure, 188.

L

LAKHIRAJ LAND—
created before or after 1790, whether a patnidar can resume, 44.

LANDLORD—
money payable to, for use and occupation of land is rent, 14—8.

LATE TALUKDAR—
meaning of, 156.

LEASE—
of lands in taluk, proprietor's right to give, 1.
including jote-jamas and *patni taluk*, creation of *patni taluk* by, 11.
creating patnis in more estates than one, creation of *patni taluk* by, 11.
violating the rules against perpetuities, creation of *patni taluk* by, 11, 12.
a patni, is not agricultural lease, 13.
money payable as stipulated in a, is rent, 15.
stipulation for payment of *abwob* in a permanent mokurari, is valid, 18.

LEASE—*contd.*
stipulation for payment of abwab in a patni or darpatni, is valid, 19.
with defined boundaries covers all lands, more or less, 25.
parol evidence is admissible to explain the deed of, 46.
granted in contravention of law in force, validity of, 49.
competency of proprietor to grant, at his discretion, 49, 50.
removal of prohibition against granting, for terms exceeding 10 years, 50.
stipulation for payment of *abwab* under a permanent mokurari, is valid, 75.
is an incumbrance, 114.

LESSEES—
right of temporary, to minerals, 63—5.
right of permanent, to minerals, 63—6.

LIABILITY—
of transferee of a portion of *patni taluk* ceases when the whole is transferred, 54.
of tenant for rent on charge of landlord, 55.
of purchaser, when tenures sold otherwise than for arrears of rent, 67.
——— when tenure sold for arrears of rent, 67.

LIEN—
statutory, cannot be created by consent, 130.
created by s. 13 of the Regulation is a statutory one, 130.
created by s. 13 of the Regulation is tantamount to usufructuary mortgage, 132.
extinction of such, how made, 132, 133.

LIMITATION—
under Reg. XLIV of 1793 for arrangement to lease lands in taluk, I.
in case of an alienation by Hindu widow, 7, 8.
in case of grant of patni by shebait, 10.
of suit to recover possession of resumed *chakeran* land, 43.
as to application for registration of name, 84.
in case of adverse possession, 123.
in case of arrears of rent, 125.
as to suit for contribution, 139.
of suit to set aside patni sales, 152.
——— for arrears of rent when sale is set aside, 152.
——— where litigation is pending, 152.
——— when fraud is alleged, 153.
in suit to recover co-sharer's share, 154.
for suit by under-tenant for compensation, 163.

LOCAL EXTENT—
of Reg. VIII of 1819, 5.

LOSSES—
purchaser must be indemnified against all, 146.

LOTS—
for sale, notice should specify, 93.

M

MEASUREMENT—
co-sharer's right of, in an undivided estate, 45.
proprietor's right of, under ss. 90, 91 of B. T. Act, 45.
of raiyat's holding in darpatni by patnidar, 76.

MERGER—
doctrine of, before passing of Transfer of Property Act, 62, 63.

MESNE PROFITS—
right to, for the period out of possession, 150.

MINERALS—
temporary lessees have no right to, 63.
right of permanent lessees to, 63, 64.

MISREPRESENTATION—
of assets, abatement of rent on the ground of, 31.

MOKURRARI LEASE—*See* LEASE.

MORTGAGE—
when not an incumbrance, 115.
created by s. 171 of B. T. Act is not an incumbrance, 130
must be of the entire estate, 130.

MORTGAGEE—
of a share when entitled to contribution, 139.
may sue to set aside sale, 146.
to be paid from surplus sale-proceeds, right of, 160.
landlord to be paid in priority to, 161.

MORTGAGOR—
creation of *patni taluk* by, 10, 11.
can bid at sale of patni, 110.
of patni is not a defaulter, 110.

MOTHER—
creation of *patni taluk* by proprietor's widowed, 57.

MOWROSEE IJARAH—
difference between taluk and, 52.

MUHAMMADAN WIDOW—
creation of *patni taluk* by, 9.

MUKHTEAR'S FEES—*See* FEES.

N

NAWAB NAZIM'S DEBT ACT—
property mentioned in schedule of, Patni Sale Law whether applicable to, 89.

NON-OCCUPANCY-RIGHT—
is an incumbrance, 115.

NOTICE—
under s. 8, cls. 2, 3, what should be contained in, 93.
publication of, essential for the validity of sale, 94.
places where notice should be published, 94.
original, must be stuck up at collector's cutcherry, 94.
must be stuck up at some conspicuous place, 94.
sticking-up of the, during office-hours sufficient, 95.
must be stuck up till the date of sale, 96.
due publication of, essential, 96.
personal service of, not sufficient, 96.
must be served on patni in arrear, 97.
must be served at the cutcherry on patni in arrear, 97, 98.
signature of three substantial persons necessary for service of, 99.
value of certification of, 101.
proof of service of, 101—104.
date when, to be published, 104, 105.
defective publication of, is sufficient plea for reversal of sale, 105, 106.

NOTICE—*contd.*
rule not appplicable to, affixed at the Collectorate, 106.
of sale, effect of defective service of, 106.
date of sale after due service of, 106.
onus of service of, 107.
plea of non-service of, when may be taken, 108.
by depositor must be given to tenants of his title, 130.
of sale by Independent Deputy Collector, publication of, 172.
publication of, required by law to be advertised, 172.
of sale what to contain, 181.

O

OBJECT—
for which Reg. VIII of 1819 was enacted, 1.

OCCUPANCY-RIGHTS—
is an incumbrance, 115.
transferability of, 177, 178.

ONUS—
of service of notice, 107.
as regards incumbrance, 122.
of service of notice in a suit to set aside patni sale, 152.

OPPOSITION—
procedure in case of, to purchaser, 154.
procedure in case of continued, to purchaser, 155.

OWNERSHIP—
as zamindar, patnidar can exercise same all rights of, 51.

P

PAIKAST RAIYAT—
meaning of, 120.

PAROL EVIDENCE—
admissible to explain the deed of lease, 46.

PARTITION—
amongst landlords is binding on patnidar, 56.
amongst patnidars is not binding on landlord, 56.
landlord may recognise, by accepting rent, 57.
when written consent to a, not necessary, 57.
dakhilas not amounting to written consent to a, 57, 58.
right of, when two parties in joint possession of land under permanent title, 59.
question of convenience in a suit for, 61.
between patnidar and zamindar, 58.
patnidar entitled to claim, 59.
rules deducible from authorities as to such, 61.
suit for, against co-patnidar, 62.

PATNI—
derivation of the word, 4.

PATNIDAR—
taking land not covered by kabuliyat, creation of *patni taluk* by, 11, 12.
entitled to compensation when patni land taken up for public purposes, 34, 38.
right of, to resume *chakeran* land, 38.
whether entitled to resume *chakeran* land, 39.

PATNIDAR—*contd.*
partition between, and zamindar, 58.
entitled to claim partition, 59.
whether can resume lakhiraj land created before or after 1790, 44.
right of, as to underletting declared, 50.
can exercise same all rights of ownership as zamindar, 51.
who gives darpàtni cannot measure raiyat's holding, 76.
procedure in case of succession on the death of a registered, 81.
may bring a suit to register his name, 82.
purchaser at a revenue-sale may transfer his right to a, 118.
paying Govt. revenue is entitled to contribution, 138.
contesting zamindar's demand may apply for summary investigation, 143.
defaulting, whether purchaser can proceed against, 147.
effect of reversal of sale upon, 148.
liable to pay arrears of rent when sale is set aside, 148.
not so liable when there is *mala fide* interference with tenants' possession by zamindar, 149.

PATNI KABULIYAT—
execution of, 12, 13.

PATNI LAW—
whether relevant to the question of title, 143.

PATNI LEASE—
not an agricultural lease, 13.
not an out-and-out sale, 13.
See LEASE.

PATNI RENT—
must be based on *patni patta*, 14.
payment of revenue into Collectorate to save estate from sale is sufficient payment of, 14.
payment of, by instalment, 23.
See RENT.

PATNI SALE—
Law, whether applicable to property mentioned in schedule of Nawab Nazim's Debt Act, 89.
See SALE.

PATNI TALUK(S)—
origin of, 4, 5.
created by proprietors of temporarily-settled estate, validity of, 5.
,, Hindu widow, validity of, 5, 6.
,, proprietor's widowed mother, validity of, 7.
,, Muhammadan widow, validity of, 9.
,, a shebait, validity of, 9, 10.
,, a mortgagor, validity of, 10, 11.
,, a lease including *jote-jamas* and *patni taluk*, validity of, 11.
,, a lease creating patnis in more estates than one, 11.
,, a patnidar taking land not covered by kabuliyat, 11.
,, lease violating the rules against perpetuities, 11, 12.
,, *benami* transaction, 12.
are valid tenures in perpetuity, 50.
are transferable, 50.
are answerable for debt, 50.
are heritable by their conditions, 50, 52.
refund of bonus paid for, on failure of consideration, 33.
imports hereditary tenure, 52.
tenure in the nature of, is by its nature alienable, 53.
transfer of, 53.

PATNI TALUK(S)—*contd.*
of the second degree, rights and interest of, 72.
of the third or fourth degree, rights and interest of, 72.
zamindar cannot refuse to give effect to transfer of, 77, 78.
fee not required for possession of, by purchaser, 78.
transfer of, when zamindar may refuse sanction to, 78.
zamindar's right to demand fee upon alienation of, 78.
zamindar's right to demand substantial security from purchaser or transferee of, 78.
execution-sale of, 78.
may be attached if security not tendered, 84, 85.
periodical sale of, for arrears of rent, 86.
sale of, how conducted, 108, 109.
————,who can bid at, 109, 110.
forms to be observed on sale of, 111, 112.
incumbrance since creation of, not voidable, 117.

PATNI TENURE(S)—
what are not, within meaning of Reg. VIII of 1819, 11.
s. 61, of B. T. Act applies to, 23.
effect of B. T. Act on, 46, 47, 48.
declared not voidable for arrears of rent, 51.
are liable to sale for arrears of rent, 66.
who can apply for sale of, 89.
See PATNI TALUK.

PERIODICAL SALE.—
of *patni taluk*, *see* SALE.
rules of, extended to other sales for rent, 167, 168.

PERPETUAL SETTLEMENT—
rights to proprietors of land given by rules of, 1.

PERSONAL DEBTS—*See* DEBT.

PETITION—
one only need be presented for sale of any or all tenures in one estate, 91.
what should such, contain, 92.
not a substantial process to be observed by zamindar, publication of, 93, 94.

PLEA—
sufficient for reversal of sale, defective publication of notice is, 105, 106.
of non-service of notice when may be taken, 108.

PLEADER'S FEES—*See* FEE.

POSSESSION—
form of suit to recover, of resumed *chakaran* land, 43.
mere, for 12 years not sufficient to create darpatni tenure, 72.
right of suit for, by a holder under darpatnidar, 77.
of *patni taluk*, by purchaser, 78.
recovery of, by patnidar, 134.
right to mesne profits for the period out of, 150.
to the purchaser, delivery of, 154.
when to be given to purchaser, 184.

POST OFFICE—
payment to, not payment in time, 184.

PRIVATE TRANSFER—*See* TRANSFER.

PROCEDURE—
in case of succession on the death of a registered patnidar, 81.
where amount lodged being rent due from under-tenant, 126.
where amount lodged being advanced from private funds, 126, 127.
in case of opposition to purchaser, 154.
in case of continued opposition, 155.
in case of doubt as to jurisidiction, 172.

PROCEEDING—
on application for sale of tenure analogous to remedy by distress, 88, 89.

PROCESS—
to be observed by zamindar, publication of petition not a substantial, 93, 94.

PROFITS—
meaning of, 133.

PROOF—
of service of notice, 101—104.
of service of notice on whom lies, burden of, 107.

PROPERTY—
mentioned in schedule of Nawab Nazim's Debt Act, Patni Sale Law whether applicable to, 89.

PROTECTED INTEREST—
against purchaser of *patni taluk*, 112, 119.

PUBLICATION—
of petition not a substantial process to be observed by zamindar, 93, 94.
of notice essential for the validity of sale, 94.
defective, of notice is sufficient plea for reversal of sale, 105, 106.

PUBLIC PURPOSES—
abatement of rent where land taken for, 29.
patnidar entitled to compensation when patni land taken up for, 34—38.

PURCHASE—
by defaulter only voidable, 110.

PURCHASE-MONEY—
how to be recovered on setting aside of sale, 188.

PURCHASER—
liability of, when tenures sold otherwise than for arrears of rent, 67.
————when tenure sold for arrears of rent, 67.
of *patni taluk*, registration of name of, 78.
security by, of *patni taluk* for payment of rent, 85.
incumbrance not void but voidable by, 118.
at a revenue-sale may transfer his rights to a patnidar, 118.
at execution-sale cannot recover from original patnidar amount deposited to stay sale, 138.
paying arrear accruing before date of sale not entitled to contribution, 139.
must be indemnified against all losses, 146.
is entitled to interest upon purchase-money, 147.
is entitled to be indemnified for payment of rent, 147.
whether can proceed against defaulting patnidar, 147.
right of, to eject *khudkast* raiyats, 188.

Q

QUESTION—
of convenience in suit for partition, 61.
of title—*See* TITLE.

R

RECEIPT—
granted by landlord or his agent, when no statement of area, &c., 58.
granted by landlord's agent does not imply landlord's recognition of subdivision of tenancy, 58.

REDUCTION—
of rent. *See* ABATEMENT.

REFUND—
of bonus paid for patni taluk on failure of consideration, 33.
of money paid to save superior patni from sale, 73.
of bonus to former darpatnidar on cancellation of fresh darpatni lease granted to him by auction-purchaser, 76.
of share of sale-proceeds by creditor if sale be set aside, 161.

REGISTRATION—
in case of voluntary alienation, 79.
fee and security for such, 79.
of name of purchaser of patni taluk, 78.
of name, patnidar may bring suit to compel the, 82.
se-patnidar not entitled to bring such suit, 82.
effect of, 82, 83.
primary object of, 83.
recorded tenant liable for rent where there is no, 83.
limitation as to application for, 84.
of name essential before relief can be sought, 90.

REGISTRATION ACT—
patnidar is not proprietor as defined in, 51.
See ACTS.

REGULATIONS REFERRED TO—
1793, I, ss. 10, 11, p. 44.
,, VIII, s. 6, p. 44.
,, XIX, p. 40; (s. 6) p. 44; (s. 10) p. 44.
,, XLIV, pp. 1, 122; (s. 2) pp. 2, 49, 50.
1799, VII, (s. 15) pp. 88, 91, 167, 170, 174, 189, 190; (ss. 23, 25) p. 167.
1803, XLVII, p. 49.
1812, V, p. 2; (s. 2) pp. 2, 49, 50.
,, XVIII, pp. 2, 50.
1819, II, p. 27; (s. 30) p. 45.
1820, I, pp. 88, 166-168; (s. 2) pp. 109, 155, 157.
1825, XI, p. 27; (s. 4) pp. 26, 27.
1831, VIII, p. 170.
1832, VII, pp. 91, 170, 174.
1872, III, s. 3, p. 175.
1886, III, ss. 2, 6, p. 175.
1894, I, s. 3, pp. 166, 169, 171.
1900, I, s. 4, pp. 166, 169, 171.

RELATION—
of landlord and tenants exists between zamindar *v.* patnidar, 13, 14.

RELIEF—
under patni Regulation, registration of name essential before, 90.
procedure on application for such, 90.
against whom zamindar need proceed for, 90, 91.
to whom should application be made for such, 91.
date of presentation of petition for such, 91, 92.

RELINQUISHMENT—
and surrender of patni tenure without consent of his landlord, 71.

REMAINDER—
of sale-proceeds after satisfying demand of zamindar, disposal of, 159.

REMEDY—
where excess rent is exacted by zamindar, 24.
open to landlord for execution of rent-decree, 67, 68.
by distress, proceeding on application for sale of tenure analogous to, 88, 89.
purchaser's, where registration of his name was refused for insufficient security, 156.

RENT—
definition of, 14.
patni, must be based on patni patta, 14.
money payable to landlord is, 14.
presupposes the relation of landlord and tenant, 14—18.
money payable by a tenant to a third person is not, 15.
money payable as stipulated in a lease is, 15.
money payable under an assignment to a third person is, 15.
money payable by tenant of tenant to a third person, in agreement with landlord is, 16.
money payable for the use and occupation of land but payable to third person for the landlord is, 16.
abwabs on tenants over and above the actual rent are not, 18.
Road and Pubilc Work Cesses are recoverable as, 20.
dâk cess is not recoverable as, 22.
deposit of, in Court, 23.
enhancement and abatement of patni, 24.
————Reg. VIII of 1819 as to, 24.
————s. 52 of B. T. Act applies to, 24, 25.
exacted by zamindar, where excess, 24.
enhancement of, where lease with defined boundaries contains more land than is specified, 25.
increased, on increase of land by encroachment, etc., 27.
rate of assessment of, on such increase, 27.
when tenant not liable to enhancement of, on such increase, 28.
suit for enhancement of, by joint landlords, 28.
additional, for additional area, Bengal Tenancy Act, s. 188 as to, 28.
abatement of, on the ground of diluvion, 28.
————where land taken for public purposes, 29.
in perpetuity, validity of leases fixing, 49.
arrears of, patni tenures declared not voidable for, 51.
liability of a tenant for, on change of landlord, 55.
apportionment of, by Civil Court, 55.
patni tenures are liable to sale for arrears of, 66.
liability of purchaser when tenure sold for arrears of, 67.
liability of purchaser when tenure sold otherwise than for arrears of, 67.
consolidated, of three tenures, execution of decree of, 69.
decree by co-sharer landlord is not a decree for, 69.
abatement of, on the finding in a previous rent-suit, 75.
contract as to interest on arrears of, is binding, 75.
recorded tenant liable for, where there is no registration, 83.
security by purchaser of patni taluk for payment of, 85.
patnidar not liable for, if *Amaldastak* not granted, 85.
periodical sale of patni taluk for arrears of, 86.
limitation in case of, 125.
shareholder paying entire, is entitled to contribution, 138.
payment of arrears of, to whom to be made, 140, 141.
purchaser is entitled to be indemnified for payment of, 147.
patnidar liable to arrears of, when sale is set aside, 148.
patnidar not so liable when there is interference with tenants' possession by zamindar, 149.

RENT—*contd.*
of the period between sale and its reversal, when patnidar liable for, 150.
arrears of, accruing after purchase but before confirmation, payment of, 156.
as used in s. 169 of B. T. Act, includes interest, 158.

RENT-DECREE—
sale of tenure in execution of, obtained by persons not constituting entire body of landlords, what passes by such sale, 69, 70.
execution of, *see* REMEDY.

RENT RECOVERY ACT (VI OF 1853)—*See* ACTS.

RENT RECOVERY ACT (VIII OF 1865)—
application of, 174.
local extent of, 175.
object of, 175.
partial repeal of, 175.
See ACTS.

RECISSION—
of fixed engagement for rent, 2.

RE-SALE—
realization of deficiency on, 110.

RES JUDICATA—
in case of claims for reduction of rent, 33.

RESUMPTION—
of lakhiraj land created before or after 1790, 44.

REVENUE AGENT'S FEES—*See* FEES.

REVENUE-SALE—
purchaser at a, may transfer his rights to a patnidar, 118.

REVERSAL—
of sale, defective publication of notice is sufficient plea for, 105, 106.
of sale, *see* SALE.

REVERSIONER—
creation of patni by Hindu widow valid with consent of, 6.
acts which amount to an election to treat the lease as valid by, 7.

REVIEW—
of award in summary suit, 144.
of award, Collector's power as to, 144.

REVISIONAL POWER—
of Board, 188.

RIGHTS—
of grantee, what are the requirements to ascertain the, 65.

ROAD AND PUBLIC WORK CESSES—
are recoverable under s. 41 of Ben. Act IX of 1880, 19.
rate at which and amount on which, are to be realized, 19.
special contract of, from patnidar, 19.
are payable by talukdar and zamindar, 19.
are recoverable as rent, 20.
are not charges on the estate, 20.

S

SALAMI—
extra amount as zamindari, is an illegal cess or abwab, 19.

SALE—
patni lease is not an out-and-out, 13.
for arrears of rent, patni tenures are liable to, 66.

SALE—*contd.*
of tenure in execution of rent-decree obtained by persons not constituting entire body of landlords, what passes by, 69, 70.
of tenure in execution of rent-decree where other co-sharers made defendants, 70, 71.
of patni taluk, in execution of decree, rules applicable to, 78.
effect of, where tenant is not registered, 83.
periodical, of patni taluk for arrears of rent, 86.
of tenure analogous to remedy by distress, proceeding on application for, 88, 89.
first periodical, of patni taluk when to apply for, 87.
midyear, of patni taluk when to apply for, 87.
procedure necessary for, 87.
of patni tenure, who can apply for, 89.
at the beginning and middle of the Fasli year valid where that era prevails, 91, 92.
of any or all tenures in one estate, one petition only need be presented for, 91.
lots for, notice should specify, 93.
publication of notice essential for validity of, 94.
defective publication of notice is sufficient plea for reversal of, 105, 106.
date of, after due service of notice, 106.
of patni taluk how conducted, 108, 109.
right to bid at, 109, 110.
of patni taluk, forms to be observed on, 111, 112.
——————no underlease to stand after, 112.
of a portion does not avoid incumbrance, 118.
in execution of one decree, incumbrance not voidable where several tenures are put up for, 118.
reason of allowing under-tenant means for staying, 126.
under-tenants how may stay, 126.
of patni not to be stayed unless arrear of rent claimed be lodged, 135.
how to be stayed, 142.
may proceed although a suit may be pending in Civil Court for abatement of rent, 142.
staying, on refusal of payment of costs, 142.
patnidar may bring suit for reversal of, 144.
grounds on which, may be reversed, 144.
who can sue for reversal of, 144.
effect of setting aside, upon unregistered tenant, 145.
one of co-owners may institute suit to set aside, 146.
under-tenure-holder and mortgagee may sue to set aside, 146.
who can set aside, 146.
jurisdiction for suit to set aside, 146.
form of suit for reversal of, 151.
validity of, cannot be attacked collaterally, 152.
onus of service of notice in suit to set aside patni, 152.
validity of, cannot be attacked in a suit for ejectment by purchaser, 152.
of patni taluk when final, 155.
disposal of proceeds of, 156, 157.
conduct of, of land when all in one Collectorate, 171.
——————when in two or more Collectorates, 171, 172.
publication of notice of, by Independent Deputy Collector, 172.
for arrears of rent by whom to be conducted, 176.
notice of, where to be hung up, 176.
of *khudkast jotes*, local custom as to, 178.
notice of, what to contain, 181.
how may be stopped, 181.
right of unregistered under-tenant to stop, 182.
to be to the highest bidder, 183.
provisions as to, to apply to re-sale, 184.
what passes at a, under Ben. Act VIII of 1865, 184, 185.

SALE—*concld.*
what invalidates a, 185.
under Ben. Act VIII of 1865, jurisdiction of, 185.
of *sikmi* tenure, incumbrances at a, 191.

SALEABLE TENURE—
classes of, *see* TENURE.

SALE-PROCEEDS—
right to excess, of chakeran land sold for Government revenue, 41.
excess, disposal of, 159.
————, are not liable for rent of subsequent period, 159.
————, are property of defaulter, 159.
right of se-patnidar to, 160.
right of mortgagee to, 160.
of under-tenure how to be dealt with, 185.
See SALE.

SANCTION—
to transfer, *see* TRANSFER.

SECURITY—
substantial, zamindar's right to demand from purchaser or transferee of patni taluk, 78.
suit to compel a transferee to furnish, 82.
if not tendered in time, zamindar may attach patni taluk, 84, 85.
by purchase of patni taluk for payment of rent, 85.
insufficient, purchaser's remedy where registration of his name was refused for, 156.
Government, for cash in deposit, substitution of, 165.

SE-PATNIDAR—
not entitled to sue a darpatnidar to register his name as a transferee, 82.
to share in sale-proceeds, right of, 160.

SERVICE—
of notice, proof of, 101—104.
of notice, effect of defective, 106.
————, *onus* of, 108.

SHARE—
refund of, by creditor if sale be set aside, 161.

SHAREHOLDER—
paying entire rent is entitled to contribution, 138.

SHEBAIT—
creation of patni taluk by, 9, 10.
general principles to be followed in such cases, 10.
limitation in such cases, 10.

SIKMI TENURE—
incumbrances at a sale of, 191.

SIGNATURE—
of three substantial persons necessary for service of notice, 99.

SMALL CAUSE COURT—
suit for dâk cess is cognizable by, 23.

SPECIFICATION—
of balances, petition for sale should contain, 92.

STATUTORY LIEN—*See* LIEN.

SUBSTANTIAL PERSONS—
signature of three, necessary for service of notice, 99.
meaning of, 99, 100.

SUBSTITUTION—
of Government securities for cash in deposit, 165.

SUCCESSION—
procedure in case of, on the death of a registered patnidar, 81.

SUIT—
for enhancement of rent by joint landlords, 28.
for dâk cess is cognizable by Small Cause Court, 23.
to recover possession of resumed chakeran land, form of, 43.
limitation in such cases, 43.
for partition, question of convenience in a, 61.
for partition against co-patnidar, 62.
for refund of money paid to save superior patni from sale, 73.
right of, for possession by a holder under darpatnidar, 77.
to compel the registration of name, 82.
se-patnidar not entitled to bring such, 82.
to compel a transferee to furnish security, 82.
to recover deficiency maintainable in Civil Court, 111.
for delivery of possession against third person, 130.
contesting zamindar's right of sale may lie for its reversal, 135, 144.
for contribution, 138, 139.
for dues, auction-purchaser need not bring a fresh, 148.
for reversal of sale, form of, 151.
for ejectment by purchaser, validity of sale in a, 152.
to set aside patni sale, *onus* of service of notice in, 152.
limitation of such, 152.
limitation of, for arrears of rent when sale is set aside, 152.
limitation of such, where litigation is pending, 152.
to recover co-sharer's share, limitation in, 154.
for compensation for loss sustained by under-tenant in consequence of sale, 163.
limitation for such, 163.
when such, does not lie, 164.
to set aside sale, *see* SALE.

SUMMARY INVESTIGATION—*See* INVESTIGATION.

SURRENDER—
of patni tenure without consent of his landlord, 71.

T

TEMPORARILY-SETTLED ESTATE—
creation of *patni taluk* by proprietor of, 5.

TENANT—
recorded, liable for rent where there is no registration, 83.
effect of sale where, is not registered, 83.
an unregistered, is not a trespasser, 83.
position of an unregistered, 83, 84.
exact position of an unregistered, when patni sale is set aside, 145.
effect of setting aside sale upon unregistered, 145.

TENURE(S)—
originated on estates of the Raja of Burdwan, 2.
conditions and liabilities of such, 2, 3.
denomination of such, 3.
defect of conditions of engagement in, originated at Burdwan Raj estates, 3, 4.

TENURE(S)—*contd.*
extension of such, 3.
underletting of such, 3.
transferable, classes of, 88, 177.
transferable by title-deeds, 88.
transferable by the established usage of the country, 88.
saleable free of incumbrances, 88.
proceeding on application for sale of a, analogous to remedy by distress, 88, 89.
to be sold free of incumbrances by act of defaulter, 112.

THAKURBARI CESS—
on patni jama held not to be an abwab, 19.

TITLE—
advertisement when warranty of, 33.
patni law whether relevant to the question of, 143.

TITLE-DEED—
tenure transferable by, 88.

TO STAY SALE—*See* SALE.

TRANSFER—
of patni taluk, 53.
of a portion of a patni taluk, 53.
——————not binding on the zamindar, 53.
of patni taluk, zamindar cannot refuse to give effect to a, 77, 78.
of patni taluk, when zamindar may refuse sanction to, 78.
of fractional portion of patni taluk, rules applicable to, 78, 79.
made with permission is protected, 121.
provisions of s. 11 of the Regulation not to apply to private, 125.

TRANSFER OF PROPERTY ACT—
applicability of doctrine of merger before the passing of, 62, 63.
application of s. 108 of, to permanent alienation, 66.

TRANSFERABLE TENURES—
classes of, *see* TENURE.

TRANSFEREE—
of a portion of a patni taluk is liable severally and jointly with registered tenant, 54.
his liability ceases when the whole is transferred, 54.
an unregistered, not a trespasser, 74.
suit to compel a, to furnish security, 82.

TREES—
customary right to cut and appropriate, 114.

TRESPASSER—
an unregistered transferee not a, 74.
an unregistered tenant is not a, 83.

U

UNDER-LEASE—
not to stand after sale of patni for arrears, 112.

UNDERLETTING—
patnidar's right of, declared, 50, 63.

UNDER-TENANT—
can bid at sale of patni, 110.

UNDER-TENANT—*contd.*
reason for allowing, means of staying sale, 126.
who may stay sale, 126.
procedure when amount lodged being rent due from, 126, 127.
remedy open to, making payment to save tenure from sale, 128, 129.
claim of, for compensation for loss sustained in consequence of sale, 162.
is an incumbrance, right of, 114.

UNDER-TENURE-HOLDER—
may sue to set aside sale, 146.

UNDIVIDED ESTATE—
co-sharer's right of measurement in an, 45.

USUFRUCTUARY MORTGAGE—
lien created by s. 13 of the Regulation is tantamount to, 132.

USAGE—
of the country, tenure transferable by the established, 88.

V

VALIDITY—
of sale, publication of notice essential for, 94.
of sale in a suit for ejectment by purchaser, 152.

VALUE—
of certification of service of notice, 101.

W

WARRANTY OF TITLE—*See* TITLE.

WITHDRAWAL—
of deposit by landlord, effect of, 23.

Z

ZAMINDAR—
remedy where excess rent is enacted by, 24.
right of, to resume *chakeran* land, 38.
patnidar can exercise same all rights of ownership as, 51.
can create a tenure intermediate between himself and the patnidar, 51.
transfer of a portion of patni taluk is not pending on the, 53.
partition between patnidar and, 58.
cannot refuse to give effect to transfer of patni taluk, 77, 78.
injunction on, when granted to give effect to transfer, 78.
publication of petition not a substantial process to be observed by, 93, 94.
can bid at sale of patni, 110.
when liable to pay interest upon purchase-money, 148.
how to proceed if purchaser does not register his name, 195.

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